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SELECTIVE SERVICE AND AMNESTY

HEARING
BEFORE THE
SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SECOND CONGRESS
SECOND SESSION
ON
SELECTIVE SERVICE SYSTEM PROCEDURES AND
ADMINISTRATIVE POSSIBILITIES FOR AMNESTY

FEBRUARY 28, 29, MARCH 1, 1972

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SELECTIVE SERVICE PROCEDURES AND ADMINISTRATIVE POSSIBILITIES FOR AMNESTY

MONDAY, FEBRUARY 20, 1972

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:55 a.m., in room 4232, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding), Hart, Thurmond, and Gurney.

Also present: James Flug, chief counsel; Thomas Susman, assistant counsel; Henry Herlong, minority counsel; and Mark L. Schneider.

Senator KENNEDY. The subcommittee will come to order.

First of all, I want to apologize to our witnesses for being late starting the meeting. I was testifying in the House Foreign Affairs Committee which started at 9:30 this morning. I wish to express my regrets to our witnesses this morning, and also to the members of the press.

Senator GURNEY. How about the members of the subcommittee?

Senator KENNEDY. And to the members of the subcommittee. I did not see you there, Ed. I saw Phil. It is nice to have you here.

The Senate Subcommittee on Administrative Practice and Procedures begins its inquiry this morning with a two-fold purpose: first, to examine the current administration of the Selective Service System in the light of the recommendations of this subcommittee 2 years ago and the procedural implications of the Military Selective Service Act of 1971; and second, to explore the administrative possibilities and problems of granting executive amnesty or other forms of clemency to men who have chosen exile, to men who have chosen prison, or to men who have chosen "to go underground" rather than fulfill the obligation that the military selective service law has imposed on them.

The two issues are related in a most basic way. The draft is the driving force in the acquisition of military manpower, and the use of American military forces in Vietnam has for the first time in history turned us from a haven for political exiles into a creator of political exiles.

While the number of American troops in Vietnam has decreased substantially, the war goes on. Each week, new bombing records are set. Each week, there are more refugees and more civilian casualties. Each week we add to the toll of American deaths, and each week, American flyers are added to the prisoner-of-war list.

So here at home, the war continues to hang over the lives of young men like a storm cloud, forcing another generation to continue to make life and career decisions with one eye on the draft lottery and the other on Selective Service regulations. At this morning's session, we shall seek to meet our responsibility to these men to insure that the system which decides "who shall serve when not all serve" operates equitably and evenly. We will also get Mr. Tarr's views on the impact of an amnesty policy on the administration of the draft.

However, tomorrow and Wednesday we will concentrate entirely on the history and philosophy of amnesty, on the alternative ways to provide it, and on the implications for this nation both of granting amnesty and of denying amnesty. Our major focus will be on the administrative avenues of relief, which have in the past been the Nation's primary response to the question of reconciliation.

Even if we cannot answer all the difficult questions about amnesty, we hope to foster a dialog which will illuminate the complexities of this issue for all of us.

The issue of amnesty generates strong emotions across the country. How, some ask, can amnesty be offered to those who fled when others fought? But, others assert, how can amnesty not be offered to those who were right about the war before the rest of us?

We shall hear from those who have administered and studied amnesty in the past, and those who are most concerned now—from parents, from veterans, from exiles, and from men who have served in prison rather than participate in a war they considered immoral.

Before moving on to our first witnesses I want to stress that this subcommittee as always acknowledges and recognizes that the primary legislative responsibility for the Selective Service Act is with the Armed Services Committee, and recognizes as well the jurisdiction of the Criminal Laws Subcommittee of the Judiciary Committee, to which Senator Taft and others have made legislative recommendations in terms of amnesty. Our committee is primarily interested in the administrative procedures that can be followed to achieve the amnesty.

I am going to ask that the rest of the statement be included in its entirety in the record at this time.

(The full statement of Senator Kennedy follows:)

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY, OF MASSACHUSETTS,
FEBRUARY 28, 1972

The Senate Subcommittee on Administrative Practice and Procedure begins its inquiry this morning with a two-fold purpose: first, to examine the current administration of the Selective Service System in the light of the recommendations of this Subcommittee two years ago and the procedural implications of the Military Selective Service Act of 1971; and second, to explore administrative possibilities and problems of granting executive amnesty or other forms of clemency to men who have chosen exile, to men who have chosen prison, or to men who have chosen "to go underground" rather than fulfill the obligation that the Military Selective Service Law has imposed on them.

The two issues are related in a most basic way. The draft is the driving force in the acquisition of military manpower, and the use of American military forces in Vietnam has for the first time in history turned us from a haven for political exiles into a creator of political exiles.

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are more refugees and more civilian casualties. Each week, we add to the toll of American deaths, and each week, American flyers are added to the prisoner-of-war list.

So here at home, the war continues to hang over the lives of young American men like a storm cloud, forcing another generation to continue to make life and career decisions with one eye on the draft lottery and the other on Selective Service regulations. At this morning's session, we shall seek to meet our responsibility to these men to insure that the system which decides, "who shall serve when not all serve" operates equitably and evenly. We will also get Mr. Tarr's views on the impact of an amnesty policy on the administration of the draft.

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We shall hear from those who have administered and studied amnesty in the past, and those who are most concerned now—from parents, from veterans, from exiles, and from men who have served in prison rather than participate in a war they considered immoral.

Before moving on to our first witness, I want to stress that, as always, this Subcommittee delves into this field with the full acknowledgement and recognition that primary legislative responsibility lies in other Committees with whom we keep close touch. Any changes in the Military Selective Service Act must, of course, be a matter for the Armed Services Committee, which in the past has given the most serious consideration to our studies and recommendations. On the subject of amnesty, to the extent a legislative route may be decided upon, there are proposals which are before the Criminal Laws Subcommittee, and I am pleased to sit on that Subcommittee as well.

As we start today's hearing, I would like to recall that two years ago this Subcommittee issued a report with recommendations for Selective Service reform.

Many of the reforms which we suggested, or which the Marshall Commission suggested three years before that, have been accomplished by legislative, executive, or court action:

- the elimination of occupational deferments
- the institution of random selection of registrants with the youngest drafted first and use of computer to assure the random nature of selection process
- an end to new undergraduate and graduate student deferments.
- an end to punitive reclassification
- an end to state and local quotas and use of national system operated under uniform rules
- the director of Selective Service to be a civilian
- the registrant to have the right to present witnesses, and the right to personal appearances at local and all appeal boards, the right to require a quorum of board members at personal appearances, the right to have a written statement of reasons for denial of claims and the right to have a reopening of case on a showing of new facts.

In some of these areas, the new Director has provided a welcome concern for the need to reform and he should certainly be commended for his efforts in that regard.

However, it was clear in this year's draft debate that the opposition of the Selective Service System to procedural rights for registrants, to pre-publication requirements and to statutory requirements for non-discrimination in the ap-

pointment of local and appeal board members, reflected a willingness to unduly sacrifice the rights of registrants to the ease of its own operations.

Now, we are concerned at recent actions of the Selective Service System in seeking to meet the procedural requirements of the Military Selective Service Act of 1971.

For the first time, that Act clearly sought to guarantee registrants that they would be treated fairly and that their rights would be preserved.

And so specific changes were made, changes which I think were important to insure greater uniformity and coherence to the system.

First, it was required that the system pre-publish its regulations and afford a 30-day period for comment. This amendment which I introduced, was passed in the Senate, approved by the Conference and finally ratified by both Houses.

It was intended to insure that the rules affecting registrants would be clear, concise, correct, and cohesive, and would have the benefit of outside comment before they were finally issued.

In practice, that mandate has been doubly weakened. On the one hand, many vital guidelines for local boards and appellate procedures, substantially affecting the rights and obligations of registrants, have been issued without the opportunity for comment and thus in violation of the spirit, if not the letter, of the law. On the other hand, the pre-published regulations have been allowed to become bogged down and delayed within the Executive Bureaucracy, so that 5 months after complete regulations should have been issued, the various proposals are still in disparate stages of flux and finality.

The overall result is a layering of directives, letters, memoranda, proposed regulations, and regulations that presents the boards themselves, the registrants, and all of us, with a confusing maze of contradictory instructions.

It is bad enough that the registrant is in the dark, but it is ludicrous that the local board members also are closeted with the musty practices of the past and denied exposure to the present state of the law. No copies of the law, of the conference report, of proposed regulations, or of final regulations have been sent to individual local board members by the national headquarters of Selective Service.

If there is information available to the local board members, it comes from their clerk or from the state office on the same haphazard basis that was condemned by the Marshall Commission 5 years ago.

The board member apparently is expected to absorb the intricacies of the applicable laws, regulations, and directives, from the clerk, who has the board's sole copies, at the moment the board sits to judge each registrant's claim for a classification.

In short, then, the information process in the system just is not working.

Second, at a time when the Congress specifically has granted new rights—to present witnesses, to obtain a written statement of reason for the denial of a claim, to require a quorum, to require allowance of personal appearances—the Selective Service System has been lethargic in its response.

Thousands of young men remain in limbo, unsure of their status, unaware of their current rights and obligations, unable to make the appearances or appeals to which law and equity entitle them.

And third, and more disturbing, in a variety of ways, wherever the Congress failed expressly to broaden a registrant's rights, the new regulations tend to restrict them:

- the government appeal agent was removed without being replaced by legal advisors with the same power to order reopening of cases;

- the time period for filing appeals has been cut in half and in at least one instance in quarters;

- the conscientious objector now faces prosecution for failure to perform his work satisfactorily on the word of his employer and the judgment of the state director—all without legal counsel or rights to appeal.

Despite the reforms, that is what has happened, and we want to know why.

And we would like to hear from the Director why in the past two years, nothing has been done to effect any substantial change in the under-representation of minorities on appeal boards, where unbiased treatment is a critical requirement for justice. In 24 states, there is not a single black, Chicano, Indian or Oriental on an appeal board.

These are some of the questions that we hope can be answered today, so that we can insure that the trend underway since the repressive 1967 law, a trend toward more equity and justice for the individual registrant, can be continued and accelerated. We not only have a long way to go, but the recent actions of the Selective Service System raise questions as to whether it is aware of the direction in which it is headed.

Senator KENNEDY. Senator Hart.

Senator HART. No statement. I am just grateful that you have again permitted us to focus in an effort really better to understand how we can achieve what I hope all of us seek, to manage as a people to insure that the State does not form our conscience, and that we remain free, not just theoretically, but practically, to be able to be protected in the exercise of our conscience.

Senator KENNEDY. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I just want to say that I happen to be a member of the Armed Services Committee too, and I presume it is not intended here to go into matters of which the Armed Services Committee has jurisdiction. I should be glad to participate in the hearings on that basis.

The Selective Service System, in my judgment, is essential to the security of the Nation. We only use the Selective Service System when we do not get enough volunteers. If we do not get enough volunteers then what will the defense establishment do? What will our country do unless we have a Selective Service System? I am very pleased to listen here and to hear what the witnesses have to say, and we are delighted Dr. Tarr is with us here today, who is an expert on this question.

Senator KENNEDY. Thank you very much.

Senator Gurney.

Senator GURNEY. No statement, Mr. Chairman.

Senator KENNEDY. Mr. Tarr, we want to welcome you to the committee. I must say that I have enjoyed the opportunity I have had in the past to talk with you about some of these matters. You have been extremely cooperative and helpful, and willing to meet with me individually about some of the procedures which have been followed by the Selective Service System. And I want to extend a warm welcome to you and to your associates for coming up here this morning.

You may proceed in whatever way you wish. You have a very extensive statement. You were very kind to make it available to us over the course of the weekend. So often we do not get the testimony, and then we are all trying to read it for the first time the morning of the hearing. I want to commend you for it, and you may either read the statement or summarize it, it is fine with me. I have had a chance to go over it; and I know the areas which I am interested in developing.

STATEMENT OF CURTIS W. TARR, DIRECTOR OF SELECTIVE SERVICE; ACCOMPANIED BY SAMUEL R. SHAW, LEGISLATIVE LIAISON, AND WALTER H. MORSE, GENERAL COUNSEL

Mr. TARR. Mr. Chairman, I would like to read the statement, because I think that it will provide a basis by which fuller questioning would be more effective.

Mr. Chairman, I appreciate the opportunity to appear before you.

SENATOR KENNEDY. What are the names of your associates, please?

Mr. TARR. Excuse me. Mr. Samuel Shaw. He is our director of—what do we call you, Sam?

Mr. SHAW. Legislative liaison.

Mr. TARR. And Mr. Walter Morse is our general counsel.

During the 5 months that have elapsed since the President signed the bill amending the Military Selective Service Act, we in Selective Service have been busy with changes required by the legislation and the continuation of major modifications of the System that started with my appointment nearly 2 years ago.

I accepted this position with an acute awareness of the anguish that conscription brings into the lives of young people. For 10 years before coming to Washington, I worked with college youth. I have vivid memories of their experiences, none of which caused them more uncertainty than the prospects of compulsory service in a war they did not understand. Yet I realized that the draft could not be halted abruptly without affecting critically the military strength of the Nation, perhaps to a perilous degree. Someone had to assume the difficult role of becoming Director, responding to the continuing needs for manpower requested by the Secretary of Defense, and at the same time initiating essential reforms.

The President offered his advice when he directed me to assume this responsibility that he knew I accepted with reluctance. He recommended that I consider seriously all those actions which promised to make the draft more equitable to the young people of this Nation. The President then described for me the thorough review of manpower procurement for the Armed Forces that had been undertaken by the National Security Council, suggesting that I might gain considerable insight from that source. Secretary Kelley mentioned this study several times in his testimony before this subcommittee in 1969.

I spent many hours with the National Security Council personnel who undertook this work. In fact, I hired four of them to join my staff. The Council study group had made a splendid historical investigation, they had analyzed thoroughly the legal implications of change, they knew a great deal about inequities, and they understood management problems. Their work and my own investigation became the basis for our major reorganization and reorientation of the Selective Service System.

Mr. Chairman, I have prepared a chart indicating the major recommendations of the Marshall Commission, the Clark panel, the Magruder task force, the General Accounting Office, and finally, the comprehensive work of this subcommittee just before I became Director. I have also shown the progress made in each of these areas during the last 2 years. I would appreciate having the chart included in the record, although I will not take the time to read it now.

SENATOR KENNEDY. We will include it in the record.

(The chart referred to by Mr. Tarr follows:)

Subject	The National Advisory Commission on Selective Service, February 1967	Civilian Advisory Panel on Military Manpower Procurement, Feb. 28, 1967	Task Force on Structure of the Selective Service System, Oct. 16, 1967	GAO, 1966-70	Subcommittee on Administrative Practice and Procedure, 1970	Disposition
A. Alternatives to the draft:						
1. Eliminate draft and establish an all-volunteer force.	Not feasible. Inflexibility would prohibit rapid procurement in time of crisis.	Same and also emphasized moral objection to the concept of defense of nation by mercenaries.	No comment	No comment	Undesirable since only the economically and socially disadvantaged would enlist.	Moving toward an all-volunteer army based on guidance of the President and the Gates Commission report.
2. Universal military training.	Not an acceptable solution since there is no military need for it.	Same	do	do	Same	No planning by SSS for implementation of universal training.
3. Alternative or equivalent national service.	Not a substitute for military service.	No way to equate military service with nonmilitary service.	do	do	Compulsory national service would be unconstitutional.	No planning by SSS for National Service whether compulsory for all or as a voluntary substitute for induction.
B. Deferment and exemption policy:						
4. Undergraduate student deferments.	Eliminate new student deferments, but allow registrants to finish sophomore year before being inducted.	Undergraduate students deferred until receipt of degree or age 24.	do	do	Eliminate undergraduate deferments during times of conflict.	Military Selective Service Act as amended in 1971 eliminated student deferments for those not enrolled as full-time students during the 1970-71 academic year.
5. Postgraduate deferments (including deferments for medical and dental school).	No deferments.	Provide deferments for those studying for occupations defined as critical to national security needs.	do	do	Maintain graduate student deferments only for medical students.	All new graduate student deferments except for those in medical or dental school were eliminated by Executive order on June 30, 1967.
6. Occupational and agricultural deferments.	Eliminate entirely except for those who already held the deferment.	Have lists of essential occupations for deferment.	do	do	Eliminate occupational and agricultural deferments.	Executive order on Apr. 23, 1970, eliminated all new occupational and agricultural deferments.
7. Apprenticeship deferments.	Eliminate new apprenticeship deferments, but allow those already deferred to complete their program.	Defer those apprentices preparing for essential occupations.	do	do	Maintain apprenticeship deferments for as long as undergraduate student deferments continue.	New apprenticeship deferments eliminated administratively by regulations when new undergraduate student deferments eliminated. Those registrants in apprenticeship programs prior to July 1, 1971, would be deferred to complete their apprenticeships.

Subject	The National Advisory Commission on Selective Service, February 1967	Civilian Advisory Panel on Military Manpower Procurement, Feb. 28, 1967	Task Force on Structure of the Selective Service System, Oct. 16, 1967	GAO, 1966-70	Subcommittee on Administrative Practice and Procedure, 1970	Disposition
8. Hardship deferments.	Continue to grant them-----	Continue to grant them-----	do-----	do-----	Continue to grant them-----	No change—hardship deferments are still granted.
9. Paternity deferments.	No comment-----	No comment-----	do-----	do-----	Eliminate paternity deferments.	Executive order on Apr. 23, 1970, eliminated all new paternity deferments.
10. Reserve deferments.	Allow only those registrants not classified 1-A to join the Reserve or National Guard. If manpower levels drop, then induct for the Reserve and National Guard.	Continue Reserve deferments: (a) those Reservists not satisfactory meeting their Reserve obligation would be placed on 2 years active duty (b) place Vietnam burden on reservists and inductees alike.	do-----	do-----	No comment-----	1. Registrants may enlist in the Reserve or National Guard up until the date they are issued an induction order (Military Selective Service Act of 1967). 2. Reservists not satisfactorily meeting their Reserve obligation may be ordered to active duty, or if unable to be located, may be ordered for priority induction, may be ordered for priority induction (Military Selective Service Act of 1967).
11. Conscientious objectors.	Interpret "religious" basis for conscientious objection broadly; do not allow selective conscientious objection. ¹ Establish special boards to hear CO cases.	Amend the law to provide local boards with understandable criteria for granting CO classifications.	No special boards to handle CO's.	do-----	Study possibility of selective conscientious objection.	1. Selective CO not allowed (Supreme Court ruled against selective CO in the <i>Negro and Galtie</i> cases on Apr. 26, 1971, and in June 1971 the Senate rejected an amendment to the Military Selective Service Act which would have allowed selective CO). 2. Basis for claiming CO broadened as a result of Supreme Court's <i>Welsh</i> decision of June 15, 1970. 3. LBNR 107 issued July 6, 1970 by Director is guide for local boards in deciding CO cases.

12. Ministerial exemptions. No comment. No comment. No comment. do. No change in exemptions for ministers.
13. Aliens. 1. Exempt nonimmigrant aliens from service.
2. Do not allow aliens to be drafted until after 1 year of residency in United States. 3. Exempt aliens who served 12 months or more in the armed forces of a country with which the United States is allied.
Military Selective Service Act as amended in 1971 related ministerial exemptions, but created a deferment for ministerial students.
Military Selective Service Act as amended in 1971 does the following: 1. Exempts nonimmigrant aliens from registration and service. 2. Prohibits aliens being drafted until after 1 year of residency in United States. 3. Exempts aliens from service who have served 12 months or more in the armed forces of a country with which the United States is allied. 4. Defers certain aliens by virtue of occupational status for duration of that status.
14. Order of call. Youngest men first beginning at age 19, of registrants classified 1-A.
15. Method of selection of 1-A to 1. Recommends national system of random selection; no State or local quotas; use lottery system.
Order for induction those registrants in 19-to-20 year-old age group and those losing deferments by a "modified young age class system".
Oppose "lottery" system in any form. Oppose abandonment of State/local system; use date of birth in determining the order of call and selection of pool of eligibles.
Random selection by computer; do not use manual means of randomizing birth dates.
- Those men who are classified 1-A, 1-A-O and will become 20 during the calendar year and those who lose deferments are in the first priority induction group. Selection from this group is by random sequence number.
Use of national system of random selection; elimination of quotas; use of a lottery system where capsules are placed into rotating drums in a random order determined by computer.

Subject	The National Advisory Commission on Selective Service, February 1967	Civilian Advisory Panel on Military Manpower Procurement, Feb. 28, 1967	Task Force on Structure of the Selective Service System, Oct. 16, 1967	GAO, 1966-70	Subcommittee on Administrative Practice and Procedure, 1970	Disposition
D. Organization of Selective Service System: 16. Structuring of local and appeal boards of the System.	Consolidate 4,000 local boards into 300-500 area offices. Eliminate State headquarters and establish 3 regional offices. Appoint civilian employees at area and regional level to replace State appeal boards. Use ADP equipment for record-keeping and reports.	Preserve existing organization. Recommend a watchdog committee to achieve optimum uniformity of the law. Do not use centralized ADP equipment.	Do not restructure local board/State headquarters system. Group local boards in large metropolitan areas where a registrant won't have to travel great distances. Use of confederacies and additional personnel is considered. DO not use ADP equipment.	Consolidate local boards to achieve saving. Group clerical help for savings as an alternative to consolidation.	Recommendations are that renewed consideration be given to the Marshall Commission recommendation. Use ADP equipment.	Retain local and appeal boards and State headquarters. Presently have over 4,000 local boards and over 110 State appeal boards. Also one National appeal board. Program to consolidate and collocate boards in 1971 halted by congressional pressure. ADP equipment now being used for record-keeping, reporting, accounting, payroll, and personnel systems.
17. Independence of the Presidential Appeal Board from national headquarters.	No comment	No comment	No comment	No comment	Recommendation that the National Appeal Board be housed in a separate building, from national headquarters.	National Appeal Board was moved from national headquarters in the summer of 1970.
Personnel: 18. Military vs. civilian status and tenure of the Director.	do.	do.	do.	do.	Director of Selective Service and his staff should be civilian; Director's tenure should be limited to 5-year terms. Local board members should be fully representative of the community they serve in terms of race, age, and economic background.	The present Director, a civilian, has endeavored to increase civilian personnel in national and state headquarters; no limit on Director's tenure. Military Selective Service Act as amended in 1971 provides for maximum of 20 years' service and age limits of 18-65 years. Attempts made to insure that local board members are proportionately representative of the racial and economic composition of their jurisdiction.
19. Local board members, composition and tenure.	Local board members should represent all elements of public they serve; limit local board service to 5 years and establish maximum age for retirement. Allow women to serve.	Local board members should be limited to a 10-year term.	do.	do.		

20. Status and pay of nonvoluntary personnel.	Civil Service employees should staff area offices and regional offices.	The title for the position of Chief Clerk be changed to "Executive Secretary."	The Selective Service System should either- (1) adopt pay schedules provided for Civil Service employees; (2) establish a plan which realistically follows prevailing wage concepts.	do.....	Position of local board clerk should be upgraded in experience, schooling, and pay. Civil service status should be extended to staff employees at local, State, and national levels.	Title changed to Executive Secretary in military selective service law of 1967. Civil status has not been attained. (Proposed by the Administration in 1971.) Programs begun for proper grade levels for employees, career advancement.
21. Government appeal agents.	Appeal agents should be available at area offices to help registrants make their appeals.	No comment.....	No comment.....	do.....	Legal training should be mandatory for Government appeal agents. All information given by registrant to the agent should be confidential.	The Government appeal agent's position was eliminated in regulations issued by the Director in 1971 to prevent dual accountability of person to registrant and local board. Function transferred to advisor to registrant. Program begun to inform advisors of duties, train them, recruit sufficient numbers.
F. Classification procedures:						
22. Punitive reclassifications.	No comment.....	Those who are violators of the draft law should be severely and expeditiously punished.	do.....	do.....	Abolish all punitive reclassifications.	Punitive reclassifications were prohibited by the Supreme Court in the Gutknecht decision of 1970; local boards have been informed of this change; those previously indicted because of this have been relieved from indictment. Military Selective Service Act as amended in 1971 required: (1) witnesses, (2) local board quorum, (3) written reasons for denial of claim in all personal appearances before the local board.
23. Personal appearance at local board and decisions by local boards.	Local boards should be made to record their decisions in writing.	No comment.....	do.....	do.....	Registrant should have right to the following at personal appearance: (1) witnesses, (2) legal counsel, (3) local board quorum, (4) written transcript of personal appearance including written reason for denial of claim.	

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24. Registrants' classification reopened on showing new facts.	No comment.	do	do	do	Reopening should be mandatory and not left to the discretion of the local board when a registrant has presented new facts for a classification.	Mulloy v. United States (1970) made it mandatory for a local board to reopen a registrant's classification where the registrant has set forth new facts which, if true, establish a prima facie case for a new classification.
25. Transfer of local board when residence changes.	Allow registrants to change their board when they change their permanent addresses.	do	do	do	Registrant should be allowed to transfer board when he transfers residence.	No transfer of local board is allowed but a registrant may transfer for classification, appeals and physical examination; may report for induction at another location.
G. Appeal procedures: 26. Personal appearance at appeal board.	No comment.	do	do	do	Recommends personal appearance at appeal board.	Military Selective Service Act as amended in 1971 allows registrant the right to a personal appearance before the State and national appeal boards.
27. Right to counsel and right to present witnesses to appeal board.	do	do	do	do	Recommends that registrant be given right to counsel before the appeal board and the right to present witnesses to appeal board.	Military Selective Service Act as amended in 1971 did not grant to the registrant rights to counsel or witnesses in personal appearances before the appeal board.
28. Written option for appeal board's decision.	do	do	do	do	Recommends that appeal board give the registrant written reasons for its decision.	Registrant must be given reasons for the appeal board's decision when it is adverse to him (Military Service Act as amended in 1971).
29. Length of appeal period.	Increase from 10 to 30 days.	do	do	do	No comment	Appeal period extended to 30 days by Executive order 11350 on May 3, 1967.

H. Miscellaneous:

30. Use of window envelopes.	No comment	do	do	Standardize organization and procedures throughout System to assure uniformity.	Recommend use of window envelopes. No comment	do	Achieve greater uniformity in practice and procedures throughout the country.	Window envelopes introduced system-wide in 1971. 1. Attempts to standardize organization and procedures of system to achieve greater uniformity through issuance of comprehensive instructions and through a newly organized training program. 2. Inspection program begun in 1970 to assure greater uniformity at local boards and State headquarters.
31. Greater uniformity in System.	Apply policies regarding classifications and assignments uniformly throughout the System.	House Armed Services Committee should monitor SSS to assure uniformity throughout the System.	do	do	do	do	do	1. National public information officer has been appointed and given responsibility of informing registrants and the general public about Selective Service. 2. Each State headquarters has appointed one staff member to serve as its public information officer. 3. Pamphlets and a curriculum guide have been written and widely distributed.
32. Public information...	Make registrants and general public more aware of workings of Selective Service and the registrants' rights under it.	Appoint a deputy director of public information who is responsible for informing the public about Selective Service.	No comment	Increase State headquarters personnel to increase dissemination of public information.	do	No comment	No comment	1. National public information officer has been appointed and given responsibility of informing registrants and the general public about Selective Service. 2. Each State headquarters has appointed one staff member to serve as its public information officer. 3. Pamphlets and a curriculum guide have been written and widely distributed.
33. Select comments from the public on new regulations.	No comment	No comment	No comment	No comment	do	SSS should solicit comments on regulations from the general public before finalizing regulations.	do	Military Selective Service Act as amended in 1971 requires Selective Service to solicit comments from the general public on its regulations for 30 days before they go into effect.
34. Time limit on the return of forms.	do	do	do	do	do	do	do	Time limit for the return of forms is currently under consideration.

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35. Local board coordination with AFES.	do.	do.	do.	Realize savings through greater use of medical advisors for screening registrants before they are sent to the AFES station. Also, realize savings by sending registrants to the nearest AFES station.	No comment.	Directives have been issued listing obvious physical defects for local boards. A directive is being prepared which will provide for more effective use of medical advisors and will also allow AFES to recommend on the basis of a papers review a registrant's defects on the Surgeon General's list of disqualifications. The local board in both cases can disqualify a man if affirmative recommendations are made. Studies conducted on the transportation of men to AFES have shown that cost savings from location are offset by increased costs of scheduling and effective utilization of existing transportation facilities.
36. Economies available through improvement of records management.	do.	do.	do.	Destroy certain records for registrants over the age of liability and training. Transfer permanent records of WWII registrants to GSA operated Federal Records Centers.	do.	Records of most registrants over the age of liability and training have been destroyed. Records for WWII registrants have been transferred to GSA operated Federal Records Centers.

DEPARTMENT OF JUSTICE,
Washington, D.C., February 23, 1972.

Mr. WALTER H. MORSE,
General Counsel, Selective Service System, Washington, D.C.

DEAR Mr. MORSE: This is in response to your request for my views on whether the pre-publication requirement in Section 13(b) of the Military Selective Service Act, as amended,¹ applies only to Selective Service Regulations or also applies to "all directives that have a significant impact on registrants, including LBM's and LASD's."² You have indicated to me your own view that this requirement applies only to Selective Service Regulations, and have furnished me with copies of the System's letter to Senator Kennedy of December 22, 1971 expressing this view and of the debates in the Senate on June 17, 1973³ on the proposed amendment of Section 13(b) which

In my opinion, and as will appear below from the plain language of the provision, its legislative history, and a long and well-known administrative interpretation of the terms involved, the pre-publication requirement of Section 13(b) of the Military Selective Service Act applies in general only to Selective Service Regulations. Except to the very limited extent noted hereinafter, this requirement is inapplicable to internal communications within the Selective Service System such as LBM's, LASD's, and other messages issued by System headquarters or other parts of the System for the purpose of carrying on and managing System operations.

Before considering whether Section 13(b) applies to System materials other than the Regulations, some review is in order of the historic and fundamental differences between the Regulations and these other materials. The general distinction between Selective Service Regulations and various internal System communications such as LBM's and LASD's has long been known to most persons who are knowledgeable about selective service affairs. For a generation, Selective Service Regulations have been published in the Code of Federal Regulations as Title 32, Chapter XVI, and until just a few months ago amendments to these Regulations were almost always issued by the President.⁴ The other materials in question are not so codified and have never been issued by the President. Moreover, Selective Service Regulations generally have the force of law and are binding upon private persons according to their terms, while internal System communications such as LBM's and LASD's may be advisory or informational as well as imperative in function, and even if imperative they are generally intended to be binding only upon those elements of the System to which they are addressed, and only to the extent they do not conflict with a Regulation.

Furthermore, examination of the subject and structure of the more than two dozen Parts of the Selective Service Regulations makes it clear that the Regulations contain a mass of substantive and procedural provisions

¹ P.L. 92-129, approved Sept. 28, 1971, sec. 101(a) (32), 85 Stat. 353, 50 U.S. Code App. secs. 451 *et seq.*

² The quoted phrase is from a letter dated December 10, 1971 from Senator Kennedy to Selective Service Director Tarr expressing the view that all such directives are within the pre-publication requirement of Section 13(b) of the Act. The term LBM means Local Board Memorandum; LASD means Letter to All State Directors.

³ Cong. Rec. pages S 9355 through S 9360.

⁴ added this pre-publication requirement to the law.

⁴ See Executive Order No. 11623 of October 12, 1971, 36 Fed. Reg. 19963 of Oct. 14, 1971, which broadly delegated to the Director of the System, subject to prescribed procedures, the President's authority to issue Selective Service Regulations. Prior to this action last October, and at the time the pre-publication provision in Section 13(b) of the Act was passed, the Director had been delegated only a very limited amount of authority to issue such Regulations, but was not inhibited in issuing LBM's, LASD's, etc. on his own authority, except of course to the extent such an internal communication might be inconsistent with the Regulations and other sources of law. Thus, in the world of selective service, the word "regulations" can generally be regarded as meaning the kind of materials that were issued by the President rather than by the Director, or under the very limited Presidential authority to issue regulations long delegated to the Director, until the time some weeks after the pre-publication amendment to Sec. 13(b) was passed when Executive Order 11623 was issued.

representing an exercise of authority delegated by Congress in the statute.⁵ Such authority goes beyond the minimal basic authority, usually characterized as executive, administrative, managerial or ministerial, that is needed to run any organization and to carry out any organizational mission. The mass of substantive and procedural material binding upon private persons which is contained in Selective Service Regulations is generally similar in its governmental function to the substantive and procedural provisions issued by other federal agencies under other acts of Congress. In other words, Selective Service Regulations, like other agency regulations, represent an exercise of delegated rulemaking authority needed to implement the general terms, objectives and norms of a particular statute. Such implementing provisions, issued by an agency to flesh out the scheme of a statute entrusted to its administration, have long been called "regulations" in federal usage; Selective Service Regulations are consistent with that usage. It should be evident that regulations of the kinds just mentioned are generally, if not absolutely, quite distinct from the mass of internal agency communications (whether called bulletins, departmental orders, circular letters, staff memorandums, etc.) by which the day-to-day operations of a federal agency must be coordinated and controlled, particularly if the agency has a sizable and far-flung field organization like that of the System.

So much for the general historical and functional distinctions between the Regulations and the other materials involved. One further matter warrants preliminary comment and clarification, namely, the precise nature of the question at hand. The question before me is not whether various internal System directives should be published or otherwise made available to the public once they are issued. In that regard I would assume the System follows the requirements of law providing for the public availability of agency records to the extent such laws apply to the particular paper.⁶ The question here is whether your agency can transmit to another part of the System any internal directive which is effective according to its terms and which may significantly impinge upon registrants, unless the directive has first been published as a contemplated directive for a period of 30 days before such transmittal.

The implications of this question should be considered in weighing the answer to be given. If the answer is to be negative—that these internal directives cannot be effectively issued without pre-publication—then the pre-publication requirement presumably would cover, for example, an internal System instruction to suspend immediately certain inductions, a directive to request additional information from certain registrants, or presumably almost any internal order of importance to the operation of the System. This last seems fairly clear: since the System's entire existence is oriented toward the effects of its work upon registrants, any System activity of any importance is likely to have some significant impact upon registrants, even if only indirectly.

If all internal directives of importance must be pre-published 30 days before they can go into effect, the System will apparently be forced to labor under a series of repeated obstacles in the conduct of its operations—obstacles consisting of delays of 30 days each at almost every separate step in such operations which may occasion some kind of order. Such a requirement would seem unique; it is not imposed even upon those federal departments and agencies that are wholly subject to the Administrative Procedure Act. Congress, however, has continued the System's exemption from most of the Administrative Procedure Act. Therefore, the pre-publication provisions of Section 13(b) should not be read expansively to impose upon

⁵ See, e.g., Part 1611, Duty to Register; Part 1613, Registration Procedures; Part 1622, Classification Rules and Principles; Part 1623, Classification Procedures; Part 1624, Appearance before Local Board; Part 1625, Reopening Registrant's Classification; Part 1626, Appeal to Appeal Board; Part 1628, Physical Examination; Part 1631, Quotas and Calls.

⁶ Cf. 5 U.S.C. 552.

the System a requirement far beyond what the Administrative Procedure Act would call for, and far more restrictive upon the System's ability to operate, unless the arguments for so reading Section 13(b) are very strong. In fact, the contrary is the case; under accepted principles of statutory interpretation, the 30-day pre-publication requirement of Section 13(b) applies in general only to Selective Service Regulations.

The statutory language is plain and unambiguous. Section 13(b) of the Act, prior to its amendment last September by Public Law 92-129, merely exempted the System from all parts of the Administrative Procedure Act except Section 3 thereof, the public information section. The statutory language here involved, an amendment to Section 13(b) added by Public Law 92-129, is as follows:

(32) Section 13(b) is amended by adding at the end thereof the following: "Notwithstanding the foregoing sentence, no *regulation* issued under this Act shall become effective until the expiration of thirty days following the date on which such *regulation* has been published in the Federal Register. After the publication of any *regulation* and prior to the date on which such *regulation* becomes effective, any person shall be given an opportunity to submit his views to the Director on such *regulation*, but no formal hearing shall be required on any such *regulation*. The requirements of this subsection may be waived by the President in the case of any *regulation* if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such *regulation* is issued." (Emphasis supplied.)

This language is quite clear; the word "regulation" is used eight times; it is not conjoined even once with any other arguably similar or broader term; and this choice of words may be contrasted with Section 10(b) of the same statute, which has long provided and still provides that the President may prescribe the necessary "rules and regulations" to carry out the Act.

If in the face of this clear statutory language recourse to the legislative history is thought necessary, it is to the same effect. The amendment in question was added on the Senate floor on June 17, 1972, and the only significant history is the Senate debate on the amendment.⁷ During that debate, Senator Kennedy, who sponsored this amendment, agreed with Senator Stennis that the amendment "is addressed * * * to regulations that the Director of Selective Service is authorized under this law to issue, and, of course, that means they must be issued with the approval of the President of the United States or his direct representative" (emphasis supplied). As hereinbefore noted, Selective Service Regulations at that time were generally issued by Executive Order, in contrast to the internal System materials which the Director has long issued on his own authority. In a further exchange during the debate, both Senators agreed on some illustrations of these regulations, including regulations defining the scope of the conscientious objector classification in the light of Supreme Court decisions, regulations prescribing the relative status of particular age groups or classes of registrants under the lottery or random selection system, and regulations on deferment of registrants married after a certain date. Senator Kennedy added that his amendment would cover "any regulations that are going to affect those who will be selected and those who will not * * * eligibility for being taken and * * * ineligibility * * *". Senator McIntire, a cosponsor of the amendment, clearly recognized the distinction between Selective Service Regulations and LBM's, saying

Another area which has troubled me is that after Selective Service regulations are issued, within a short period of time, the *Selective Service System's National Headquarters issues a local board memorandum which further explains the regulation and fills in some of the gaps*. This is an important

⁷The Conference Report, House Report No. 92-433 of July 30, 1971, is the only committee report referring to the amendment of Section 13(b), and it merely says, at page 29, that the House conferees accepted the amendment "in the interest of equity".

procedure to assure that the local boards are completely familiar with and understand how to implement these regulations. But the local board directives are not published in the Federal Register so that the people they affect are not aware of them except through their local board. Mr. President, if the regulations are published prior to their effective date, questions can be cleared up before the regulations are finalized so that the final form of the regulation may fill in some of the gaps and thereby preclude the need for such lengthy local board memorandums. (Emphasis supplied.)

Senator McIntire also noted that proposed changes in Selective Service Regulations receive lengthy review "within the executive branch", a statement which would be generally inapplicable to contemplated LBM's or other internal directives. The legislative history is thus highly persuasive that the Senate knew the difference between Selective Service Regulations and local board memorandums and chose to cover only the regulations in the amendment.

The long-standing administrative practice which distinguishes between the types of material covered by the terms in question has already been alluded to. Documentation of this practice may be found in successive compilations covering almost three decades of Presidential documents published in Title 3, Code of Federal Regulations, which shows that numerous "Selective Service Regulations" have been issued by many Executive Orders over the years.⁸ All these executive orders are indexed in these compilations under the heading "Selective Service System", subheading "Regulations", but there is nothing in the indices to these compilations to suggest either that LBM's, LASD's and the like have been deemed to be within the quoted headings or that such internal materials represent a category warranting indexing along with, if not under, these headings. Further demonstration of the administrative distinction between the Regulations and other System materials is undoubtedly available but is unnecessary: the statutory language, the legislative history, and the evidence of administrative practice noted above are more than sufficient to dispose of the question in its broad outlines.

Nevertheless, to dispose of your question fully I should touch briefly upon a subsidiary problem that may arise, because my resolution of this subsidiary problem may seem to involve a partial exception to my main conclusion. The problem is this: while agreeing generally with the conclusion that the pre-publication requirement in Section 13(b) applies only to Selective Service Regulations and not to LBM's, LASD's and the like, a person might nevertheless assert that some particular LBM requires pre-publication because it really constitutes the equivalent of a regulation.

The resolution of such a problem turns upon at least three factors. The System's own expert characterization of the document is entitled to substantial weight. Second, the function of the document is obviously important: does it provide general rules of substance and procedure binding upon the public, or does it chiefly instruct System elements in how to do their jobs, perhaps explaining the meaning or illustrating the application of the regulations as necessary but without purporting to change them. This functional distinction cannot always be clear-cut, however, especially in an agency with as many regulations and internal guidance materials as the System; some blurring may be inevitable, more or less as there is some blurring between the function of statutes and of judicial decisions interpreting them. In the case of the System, the legislative history referred to above shows that the Senate recognized some limited blurring or overlapping (see especially Senator McIntire's statement) but nevertheless chose to cover only the regulations. Accordingly, some functional overlapping of an internal document into matters that are generally within the function of regulations does not convert the document into a regulation.

The third factor bearing upon a claim that a particular LBM is really

⁸ There are 5 such Executive Orders in the 1943-48 compilation; more than a dozen in the 1949-53 compilation; at least 7 for 1954-58; 5 or more in 1959-63; and so forth.

a regulation is the past treatment by the System of its specific subject-matter. Obviously, Congress should not be deemed to have contemplated, in amending Section 13(b) so as to provide for the pre-publication of the System's regulations, that material essentially the same as that previously issued as a regulation could henceforth be issued without pre-publication by the simple device of labelling it something other than a regulation. The test here is not whether the document should be deemed a regulation because of its function, a factor discussed above. Rather, the test here is whether the document should be deemed a regulation because its specific subject-matter was embodied in a System regulation in the past. An example of this would be the issuance as an LBM of a revised version of matter previously set forth as a regulation which is being repealed. In such a case, the pre-publication requirement of Section 13(b) should in my view be complied with.

Sincerely,

RALPH E. ERICKSON,
Assistant Attorney General,
Office of Legal Counsel.

Mr. TARR. Thank you.

Senator KENNEDY. I might just say, this is really a commendable effort on your part. You have indicated a number of the topics that have been highlighted in the Marshall Commission, topics that the Congress has acted upon, the recommendations of this committee and the recommendations of various other studies. It is extremely helpful to those of us who have been trying to make the system more fair and equitable to be able to review this. I want to commend you for this.

Mr. TARR. I wish to discuss a few of the major problems that we encountered during the last 2 years in order to bridge the time span between the hearings of this committee in 1969 and the issues that we all face immediately.

RANDOM SELECTION

Although many of your witnesses in 1969 thought that random selection would cause only a superficial change in the System, in addition to the advantages it brought to registrants, it actually has caused a fundamental restructuring. Random selection has focused the conversation of our agency from a loosely coordinated collection of semi-autonomous local boards into a national system, providing visibility of the efficiency of each local board operation and the way in which registrants are treated.

That conversion is not yet complete. Much remains to be done. But we have made a start that encourages me, and I think it will encourage others as these changes continue to unfold more completely in the months ahead. Most of the initial steps now have been taken. We have launched a comprehensive program to inform all young people serving the System about their responsibilities. After more than a year of issuing instructions to the boards through comprehensive local board memoranda and letters to State directors, we have initiated the publication of the "Registrant Processing Manual." The manual, as its foreword explains, will be a compilation of instructions required to implement the selective service law and regulations, and it will replace local board memoranda and other instructions which no longer will be issued. This guidance also be-

comes the basis for a training program, starting at National Headquarters and working through each of the States, so that all compensated and uncompensated personnel will understand and be able to support national policies.

Likewise we are printing materials to help registrants understand their responsibilities and rights. Since July 1970, we published over 4 million pamphlets that have gone to local boards, schools, draft counsellors, and churches on specific topics such as conscientious objection and hardship, as well as the general problems all young men face with the draft. About 250,000 of these were printed in Spanish. The amendments to the law have made these pamphlets obsolete, and new ones are being printed. We also have developed course materials for high school classes, we send a special newsletter to draft counsellors, and we have improved greatly our direct mailing to all of our compensated and uncompensated personnel. We continue to learn a great deal about what young people think from our youth advisory committees in each State.

A national system requires accurate information on which to base decisions about manpower and in order to take corrective management action. To provide this, we have designed and procured data processing systems that now are in use. Information on new registrations and local board actions comes to national headquarters for optical scanning and storage on computer tape. From this we will soon be able to determine quickly the numbers of men available for call or deferred, and those awaiting examination or involved in procedural delays. The Director and State directors will know if boards are meeting, if men are being cared for promptly, if problems seem to be developing. The same equipment will process all personnel records, so that we can continue to appraise our recruitment of younger persons and women and minority people for our local and appeal boards and for positions as advisors to registrants. It will supply important information on compensated people, do the payroll recordkeeping, and also provide us with the cost accounting information we long have needed but could not assemble.

Finally a national system depends upon regular and frequent human contact and supervision, recommended uniformly by those who have studied our problems in the past. I have appointed a group of 13 men who requested me in the field, travelling constantly to State headquarters and local boards. They evaluate the work that is being done at all levels in the System. If our printed instructions are not understandable, then these men inform us in national headquarters so that we can make corrections. When additional training is necessary, we supply it. If one State encounters difficulty managing its alternate service program, then we will provide assistance. Furthermore, each State has its own inspection group visiting local boards constantly. Our national representatives will work with these inspectors to continue improvement of local operations.

It still is too early to appraise the progress we have made. Fundamental alterations require a great deal of time for accomplishment. But I believe that we have begun the essential work to improve Selective Service for as long as we must be able to induct men, and to provide for an effective standby system thereafter.

LOCAL BOARDS

Rather quickly I found that we faced a most difficult control problem over our 4,100 local boards, operating in about 3,500 separate offices. Many of these were open only a portion of the week. But perhaps even worse, the offices in growing communities lacked sufficient staff because the System had concentrated too large a share of its compensated people in smaller operations. For instance, at one time during 1970, we maintained a office in the Rocky Mountain area with only one registrant in the prime selection pool—and he had a random selection number of about 270—while we were 6 months behind on our correspondence in some of our East Coast offices.

Senator THURMOND. Dr. Tarr, could you get your microphone a little bit closer to you? I am not sure that the people can all hear you. Mr. TARR. These personal imbalances were difficult enough. But even more discouraging was our inability to train part-time people. Many of them worked with so few registrants that they were not current on changes and had no awareness of the problems that daily involve the clerks in metropolitan boards. Misunderstandings caused procedural errors which led to erroneous inductions and prosecutions, both of which were unfortunate, costly to correct if they could be found, and grossly unfair to registrants. Meanwhile these inequities to registrants continued, both from overworked personnel on the one hand and uninformed personnel on the other.

It became apparent to me that we must continue to rely upon the local board for a long time to come: as this committee has observed, any change in the basic structure of the System requires legislation. But we did have some latitude because we could collocate boards by offering administrative services to several boards in one office—such as metropolitan boards have done for years—and we could also consolidate work into intercounty boards for up to five counties, such as we have done occasionally in some of the Western States. Either action would utilize our personnel more effectively, facilitate training, open opportunities for promotion, and permit upgrading our most skilled people. The General Accounting Office had recommended collocation as early as 1966. We employed General Services Administration personnel in 1970, skilled in this type of reorganization, to develop a national plan to reduce the number of local offices through collocation and consolidation. Our plan was announced early in 1971.

But shortly after the announcement, I found myself at odds with many Members of Congress who for a variety of reasons opposed strenuously any change in the structure of the System. That opposition undermined the support we required for passage of our legislation, including two critical reforms: the power to phase out undergraduate student deferments and to institute a uniform national call. Accordingly I agreed to cancel my national plan for consolidation and collocation of local boards, and to abide by the amendment to the bill that eventually passed. This compromise disappointed me. We had developed our plans carefully. Carrying them out would have provided us with the possibility for reform that now can only come much more slowly.

Fortunately the legislation permits us to undertake collocations and consolidations with the permission of the Governor. I have talked with a few Governors since then, and they see the wisdom of reducing the number of boards. We have taken some isolated actions recently, providing for improved service to registrants in the process. I have refrained from developing a national plan, according to my promise. But we must undertake these actions extensively when it becomes feasible to go to a standby status.

Senator KENNEDY. Just before going into the enforcement by the local boards, you mentioned the misunderstanding and procedural errors which lead to erroneous induction and prosecutions, both of which are costly to correct, if they can be found, and grossly unfair to registrants. Could you tell us what is being done to correct the errors?

(The following detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

There are three ways a real or alleged erroneous induction case may come to the attention of the Director of Selective Service: (a) detection by System personnel attached to a local board, state headquarters or national headquarters; (b) complaint by the registrant; or (c) reference by a third party of a claimed irregularity. The ensuing investigation is primarily concerned with determining whether there were any procedural errors committed, whether the registrant was denied any of his rights under the law, and/or whether he was erroneously forwarded for induction. Findings thus developed are promptly transmitted to the inquiring authority. Adherence to procedures set forth in the attached memorandum relating to the processing of this type of case will expedite disposition of each claim.

Recent changes have been made in the Selective Service System, however, to prevent procedural errors which lead to erroneous induction.

(1) A computer system has been installed to detect errors and undue delays which may occur in the processing of the registrants.

(2) A Management Evaluation Group has been organized and placed under the direct supervision of the Deputy Director. Its function is to investigate and report major irregularities found within the System and to recommend corrective solutions to these problems.

(3) A general effort to uniformize operations system-wide has been undertaken. Specific programs involved in this effort include (a) a uniform filing system for all local boards (b) a national training plan for use with compensated and uncompensated employees at all levels of the System, and (c) the Registrant Processing Manual, designed to more clearly outline and thus uniformize local board work methods.

In addition to the above national changes, each state director continues to closely supervise each of the local boards in his state through his area supervisors and state inspectors. These persons audit and inspect local boards and their records to ensure their compliance with the Military Selective Service Act and the instructions issued by the Director.

To: Operations division personnel.

From: Operations division manager.

Subject: Processing of reported erroneous induction cases.

This intra-division memorandum prescribes standard operating procedures to be followed in the expeditious processing of erroneous induction cases which are discovered at the local board, state headquarters or received from the armed forces.

Speed is of the essence in processing alleged erroneous induction cases. The most expeditious means of determining the validity of the claim must be employed. Accordingly, the procedures set out below will be followed.

Alleged erroneous induction cases received at national headquarters from the armed forces are submitted by service personnel under paragraph 5-5b of Army Regulation (AR) 635-200. Subject regulation is quoted, in part, as follows: "An

individual claiming erroneous induction because of denial of a procedural right as provided by the Military Selective Service Act, may submit a request for release from custody and control of the Army. All requests will be forwarded to commanders specified in section VI, chapter 2, and by them, to the Director, Selective Service System, Washington, D.C. 20335, for his recommendation. Upon return of a case from the Director of Selective Service, a commander specified in section VI, chapter 2, will—

"a. Disapprove the request for release when the individual was not denied a procedural right, or

"b. Forward the request for release, together with the recommendation from the Director of Selective Service when the individual was denied a procedural right, to The Adjutant General, Department of the Army,

Attn: AGPO-SS, Washington, D.C. 20315. . . ."

If the matter is discovered at the local board level, the executive secretary will immediately telephone a report of the induction (including the registrant's social security number) and substantiating details of the state director who will then telephone at once to the Operations Division of National Headquarters.

Personnel at National Headquarters will, immediately upon receipt of such information, (a) determine the registrant's current military address from the locator section of his branch of service and (b) telephone the registrant's commanding officer advising that the man was erroneously forwarded for induction or of the possibility that he was erroneously forwarded for induction and request the commanding officer not to transfer the registrant to any other duty station until he receives a written recommendation by the Director of Selective Service in the matter.

This telephone call to the military command will be confirmed at once by a telegram and letter.

If evidence of erroneous induction is sufficiently conclusive to render unnecessary the forwarding of the registrant's selective service file to national headquarters for further review, the finding and recommendation for release from active duty under provisions of paragraph 5-5b of AR 635-300 will be set forth in a letter report by the state director to National Headquarters (attention: Operations Division). This communication must be prepared and mailed at once.

If evidence is not sufficiently conclusive or a question exists as to the propriety of the induction, the registrant's selective service file will be forwarded to the Operations Division of National Headquarters for review. Comments by the state director and executive secretary will accompany the selective service file. Upon receipt of the above-described items, high priority will be given to a review and staffing of the formulated recommendation. The final decision thus reached will be telephoned to the appropriate military command and immediately confirmed by letter.

A copy of the correspondence to the military command will be forwarded as an enclosure to the letter of transmittal which accompanies the return of the registrant's selective service files to state headquarters.

If the matter is discovered at the state level, the state director will immediately telephone the executive secretary of the local board, obtain details concerning the processing and induction, then telephone such information, including the registrant's social security number, at once to the Operations Division at National Headquarters. Personnel at National Headquarters will proceed as prescribed under paragraph 3. a, above.

If the registrant's claim of erroneous induction is received from the armed forces, the appropriate state director will be immediately contacted by telephone call from National Headquarters, advised of allegations made and requested to telephone to the executive secretary of the registrant's local board for a review of the man's selective service file and for a telephone report of findings. Such report will, in turn, be immediately telephoned by the state director to the Operations Division in National Headquarters with his findings and determination as to the validity of the claim.

All letters from the Selective Service System to a branch of the armed forces which state that a registrant was erroneously forwarded for induction, will carry a closing paragraph requesting that National Headquarters be advised, at an early date, as to whether the subject soldier was or was not discharged. Additionally, a suspense file will be established and regularly reviewed to insure receipt of that information.

There should be no delay in the processing of an obvious claim of an erroneous induction case.

The General Counsel at National Headquarters will be consulted by the Operations Division Manager before a final decision is made in every action which involves: (1) an application for release by reason of erroneous induction made by a private attorney, or (2) any application for release due to erroneous induction, where it may appear that there is a question of legal interpretation.

Mr. TARR. Mr. Chairman, the most fundamental thing that we do is in our system of inspection.

Senator KENNEDY. Of what?

Mr. TARR. In the last year, our inspectors have found errors such as the ones I described in the statement, and when we find these, then we do two things. First, we go to the Army and ask that these young men be given the opportunity to apply for a discharge immediately, and the Army has cooperated splendidly on this account. The second thing that we do is to try —

Senator KENNEDY. How many cases are you talking about now?

Mr. TARR. I am sorry. I cannot give you an answer. Mr. Chairman. I am not talking about hundreds. I may be talking about a dozen or so. I can recall three or four, but I am sorry I cannot give you the full information.

(The following more detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

Information on the number of requests the Selective Service System had made to release men erroneously inducted is not available. Records are maintained in regard to particular individuals but not by specific category. The number of erroneous inductions has not been a major problem as far as number of cases is concerned, but having one registrant illegally inducted is one too many.

The second thing we do on this is that we orient our training program in these areas where the people who operate our local board offices obviously have made the error, and do not understand how they should have done it appropriately. And we have now traveling supervisors that did not exist previously, and they can come in and help these local board executive secretaries and clerks so that they understand what the requirements of the law and the regulations are.

This, of course, does not rectify the fundamental problem of errors, because you have interrupted in a grossly unjust way, the life of a young man.

Senator KENNEDY. As you well remember, one of the recommendations of the Marshall Commission was to have professional staff personnel so that you would avoid some of the problems that you have found yourself. And the Selective Service System opposed that recommendation. That is obviously one of the things I think could have been substantially avoided if we had the professional personnel.

Mr. TARR. Mr. Chairman. I think that we could have improved it considerably if we could have continued our program for making each of the offices somewhat larger. But, the difficulty that we found is that when a person operates in an office with a very few registrants, and sometimes only on a part-time basis, it is very difficult for these people to understand thoroughly all of the regulations and all of the directives that come out.

Senator KENNEDY. Of course, it is complicated by the fact that you only make those regulations and rules available to the clerks, is that not right? You do not make those available to the members of the board, as I understand.

Mr. TARR. Well, Mr. Chairman, it is true that we have not decided to ask each local board member to maintain a Registrant's Processing Manual.

Senator KENNEDY. You have not even gone that far. You do not, as I understand, even send, and correct me if I am wrong, the new regulations to the local board members. They get their information through the clerk. But, you do not send, as a matter of policy, either the regulations or the new law to the members of the board themselves nor, for example, the committee report, which is very informative in terms of explaining the new changes.

Mr. TARR. Mr. Chairman, I do not know what was done about the committee report, because this was before I came. But, let me say —

Senator KENNEDY. Tell me what you do send, if anything, to the local board members?

Mr. TARR. Mr. Chairman, we send very carefully prepared information on all changes that affect the system to every compensated and uncompensated person in the system. If you would care, I would be happy to provide for you the special mailings that we prepared for all of our uncompensated people and sent —

Senator KENNEDY. Would you?

Mr. TARR. Continuing. To them after the law was passed, and after our final regulations were published in December. Incidentally, these will also be included in my report to the Congress, so that any Member of Congress can scrutinize those.

Senator KENNEDY. Could you make available the information you send both to the local board members and to the clerk.

Mr. TARR. I would be very happy to.

(The following more detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

The following items have been mailed to local boards since July 1, 1971: Letters to All State Directors; Selective Service News; Directives Capsule and Press Releases. [Copies attached to this response are omitted from the record.]

Senator KENNEDY. Thank you. Let us go on to the enforcement.

Mr. TARR. All right, now enforcement.

ENFORCEMENT

One of the most difficult problems at the time of my appointment, and a continuing one, was that of enforcement. I understand that you have invited a representative of the Justice Department to appear here later in these hearings, and he will be much more competent than I to deal with the steps taken by Justice in the enforcement of the Military Selective Service Act. Perhaps I can supplement what the Justice Department representative will explain by describing our efforts to assist them.

First we seek to perfect enforcement by improving our daily work

in the local board. We do this by training our people to give better service to registrants, to handle their problems in a thoughtful way, and to process their work according to regulations. We also inspect local boards to see that our personnel are following instructions, and we send out supervisors to help them better their work.

Next, we found that many of the cases awaiting indictment or trial often contained procedural errors, or they involved actions by the registrant that already had been set aside by the courts. This was true particularly after the *Gutknecht* and *Breen* decisions in January of 1970.

To inspect each of the files of registrants alleged to have violated the Selective Service Act, we called upon lawyers recruited from national and State headquarters and reserve judge advocate officers serving annual active duty tours. These men worked patiently with the case histories of thousands of registrants. The review of the files in turn gave assurance to the U.S. attorneys about the cases remaining for prosecution. Many files were returned to local boards, because they contained errors, inadequate documentation or evidence, and so that induction orders could be cancelled and the registrant be reprocessed. If the registrant is under 26, he may be called again if his random selection number is reached.

We now have appointed one or more lawyers in each of the six regions of the Nation. These men check one file before it is sent to the U.S. attorney for indictment. This, of course, is an important procedural change, because now we make certain that a registrant has committed a violation that meets all of the tests required by the courts before any action is taken in the judicial process.

Senator KENNEDY. Mr. Tarr, when was that enacted? You state that we now appoint one or more lawyers in each of the regions, and we now make certain that a registrant has committed a violation. When did that process begin?

(The following detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

In early 1971, the Director of Selective Service approved the appointment of 13 Regional Counsels with one or more in each of the six Selective Service Regions. July 1, 1971, was the target date for the assignment of all Regional Counsels. However, all positions were not finally filled until December 1971. The names and locations with areas of responsibility of the Selective Service System Regional Counsels are attached.

SELECTIVE SERVICE SYSTEM REGIONAL ATTORNEYS ADDRESS AND AREA OF RESPONSIBILITY

Region	State responsible	Regional attorney	Assistant regional attorney	Address	Telephone (FIS)
III	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York City, New York State, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, Virgin Island, and West Virginia.	Willard Silverberg	Paul Ostien	Region III Service Center, Selective Service System, Post Office Box 4130, Philadelphia, Pa. 19144.	8 215 438-7208
IV	Alabama, Canal Zone, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.	James L. Davis, Jr.		Region IV Service Center, Selective Service System, 175 Houston St., suite 950, Citizens Trust Bldg., Atlanta, Ga. 30303.	8 404-526 6197
V	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.	Neil Metcalf	Lester V. Moore, Jr., Donald Guritz.	Region V Service Center, Selective Service System, 536 South Clark St., rm. 122 Chicago, Ill. 60605.	8 312 353 7202
VI	Arkansas, Louisiana, Oklahoma, New Mexico, and Texas.	Joseph Taranto	Capt. Curtis Griffith	85 Marconi Blvd., Columbus, Ohio 43215.	8 614-469-5665
VIII	Colorado, Iowa, Kansas, Missouri, Nebraska, North Dakota, South Dakota, Utah, and Wyoming.	Bernard McNulty		Selective Service System, 4400 Dauphine St., building 601 5-A, New Orleans, La. 70140.	8 504 527 2361
IX	Arizona, Nevada, and eastern District of California.	Lt. col. Jules Klage		Region VIII Service Center, Selective Service System, Denver Federal Center, Post Office Box 25206, Denver, Colo. 80225.	8 303-234-2252
IX	Alaska.	Col. Rupert E. Park		Selective Service System, Post Office Building, room 225, 522 North Central Ave., Phoenix, Ariz. 85004.	8 602-261-3157
IX	Idaho, Montana, Oregon, Washington, central and southern California.	Lt. col. Benjamin O'Brien		Selective Service System, Post Office Box 5247, Tacoma, Wash. 98405.	8 206 383 5295
IX	Northern District of California, Guam, and Hawaii.	Guin Menard Fisher		Selective Service System, 1206 South Maple Ave., Bendix Building, room 1100, Los Angeles, Calif. 90015.	8 213 688 3158
				Selective Service System, 450 Golden Gate Ave., Federal Building (Post Office Box 36002), San Francisco, Calif. 94102.	8 415 555-6324

Mr. TARR. Mr. Chairman, it has taken us about 6 months, I presume, to make all of these appointments. The first of these men was appointed, I would think, in the Northeast, in Philadelphia, on about let us say, 9 months ago. We still are in the process of moving some people around, but we completed some staffing in each of our six area offices approximately 3 months ago.

Thus we have sought not only to protect the rights of a registrant through training and inspection, but we also have set up a screen through which the case must pass before prosecution is begun. Our regional attorneys also serve as counsel for the States and local boards of the region. They have a rather full correspondence and telephone contact with draft counselors in the area as well.

REGULATIONS

Mr. Chairman, I know that this subcommittee is interested particularly in the new regulations that we have published and are developing, and the way in which we have complied with the requirements of the new law to publish tentative regulations in the Federal Register for 30 days prior to the time they take effect.

1. PREPUBLICATION

We inserted our first proposed regulations in the Federal Register on November 3, 4, and 5, 1971, delayed somewhat until we could develop a reasonable procedure for prior circulation in the executive branch. Ultimately this problem was solved when the President signed Executive Order 11623 on October 12, 1971, giving the Director of Selective Service the authority to issue regulations of the kind previously issued by the President. The President required that such proposed regulations be sent to interested departments and agencies of the executive branch for 10 days of comment prior to prepublication in the Federal Register.

While this new procedure permits initiative that we could not formerly take, it introduces an obstacle that I did not anticipate. We have concluded that whenever we accept public suggestions for revision following our pre-publication in the Federal Register, we must send these to interested agencies and thereafter republish them again in the Federal Register. Accordingly the process can be extended one any time the Director evaluates carefully the suggestions made from any source, and this I feel obligated to do.

We received 83 letters and 19 identical petitions based upon our November prepublication, plus letters from Senators and Congressmen that usually contained copies of letters sent directly to us. I have tried to study and answer many of these letters myself, although we assembled a special task force to study thoroughly all of the comments received.

Most of the prepublished regulations were published without change and in final form on December 9 and effective the following day, since either there had been no comment on them or else the comment did not seem relevant. On January 12, we republished those

portions of the November 3, 4, and 5 regulations upon which we had received comment and made revisions. These revisions have gone first to Federal agencies. We are now evaluating the 13 letters submitted on this second issuance of tentative regulations.

On November 22, I received a thoughtful letter from 23 Senators, including some members of this subcommittee. One of the points made in that letter was that "regulations requiring prepublication include LBM's, guidelines such as those present in form 150, and all those directives that have significant impact on the registrants, including letters to state directors." Although I personally had followed the Senate debate closely on this matter and had read the conference report, I had not imagined such a sweeping interpretation would be appropriate for the word "regulations."

My general counsel had advised me carefully on what he interpreted the new law to require, and we had followed his advice precisely. But the letter from Senators caused us to solicit the counsel of the Justice Department. In reply, the Justice Department advised us that "regulations" were intended by Congress to mean those documents that always have been referred to by that term, but should we introduce general rules of substance and procedure binding on the public (rather than to repeat or explain them) in an occasional letter or memorandum we should, of course, prepublish the document. To avoid this latter situation, however, we intend only to use "regulations" as the method of rulemaking in the Selective Service System.

Assistant Attorney General Erickson has provided us a letter of interpretation on this matter, and I would like to leave a copy with you for the record. I am thankful for this clarification which we intend to follow with care, understanding as Mr. Erickson does that "some blurring may be inevitable." I would be happy to explore later with the committee the problems that would occur if all calls, notices of classes to be called for preinduction examinations, postponements, terminations of actions by boards awaiting instructions based upon court decisions or laws, and all illustrative material to System personnel were to be prepublished for 30 days in the Federal Register.

2. PROCEDURAL RIGHTS

Although there are a number of minor complaints concerning the regulations which were prepublished in the "Federal Register," there are three important changes that I would like to discuss with the subcommittee.

The first is the 15 days given to the registrant to indicate that he wishes to appear before his local or appeal board. At the present time, our regulations grant the registration 30 days to signify his intention to appeal or to appear before the local board. Our first prepublication of this regulation was not worded accurately to reflect our intent, and accordingly we decided to republish it for comment. Furthermore, the initial prepublication should have contained flexibility to handle the inevitable exigencies of communication but it did not; consequently a discretionary clause had to be added. The January 12

prepublication of this particular regulation, then, is the only one I would defend here.

Senator KENNEDY. I suppose that is a reasonable example of the importance of prepublication, because with the prepublication of a regulation you gained some additional information that showed, how that could work a particular hardship of unreasonableness on registrants outside of the county and returning peace corps person and because of that, you put in a discretionary clause.

Mr. TARR. Under random selection, we have sought to limit the exposure of a registrant to no longer than 12 months, and for most registrants this is the calendar year in which they reach age 20. If a man has been deferred and enters the pool following the start of the calendar year, then we attempt to complete his exposure before the following April. Thus we try to limit the time required to exercise procedural rights, while being careful that we do not inhibit equity in doing so. After we reviewed the entire appeals procedure following changes introduced by the new law, we decided that a significant increase in the traditional period required for procedural delays would not in itself enhance the opportunity for equity, except to extend from 10 to 30 days the period between the issuance of an induction order and the date when the man must report. Ten days did not permit a young man the time to place his personal affairs in order. Thus under our new procedures, delay for inductions has been extended by 20 days plus the time that will be required to arrange personal appearances at the State appeal boards.

Under the proposed procedures, it was necessary also that we provide reasonable notice to the registrant when he should appear at a local or appeal board. Accordingly, we decided to divide the original 30-day period into two 15-day periods, the first for registrants to signify their intentions about appeals and appearances, and the second for notice by the local board when the registrant should appear. Although this division of the 30-day period has been criticized, no one yet has made the case that it takes registrants that long to decide whether or not to appeal. The registrants I have talked with tell me that they can decide to appeal as soon as they learn that the local board has denied their claim. Some make the point that registrants in the future will think they still have 30 days instead of 15; this argument is not so valid when we recall that few registrants appealing now are likely to have appealed before.

Senator KENNEDY. As you well understand that is a controversial action that was taken by the Department. What is the basis for your authority of reduction in time?

Mr. TARR. I think, Mr. Chairman, that this is not a part of the law. It was obviously a time period created by regulations, and thus it is a matter that can be changed by regulations.

(The following more detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

Following are the times provided for requesting personal appearances and appeals since 1948. All of these were authorized by Executive Orders of the President except the current (1972) ones. The President, by Executive Order

11623 of October 12, 1971, delegated authority to promulgate regulations to the Director of Selective Service which in turn issued the 1972 regulations.

APPEAL PERIOD

1. For personal appearance before local board :
 - 1948 : 10 days, could be extended.
 - 1951 : No extension of 10 days.
 - 1967 : 30 days, no extension.
 - 1972 : 15 days, could be extended.
2. For appeal to appeal board :
 - 1948 : 10, 30, 60 days depending on location of registrant vis-a-vis local board.
 - 1967 : 30 days, could be extended.
 - 1972 : 15 days, could be extended.
3. For appeal to Presidential Appeal Board :
 - 1948 : 10 days, could be extended.
 - 1967 : 30 days, could be extended.
 - 1972 : 15 days, could be extended.

Senator KENNEDY. You see, as I understand it, you used to have 30 days to file for an appeal and you have cut that in half. I do not know how the mails are, but it seems that you just cut the time to exercise these appeal procedures by half. I understand we are going to hear later this morning testimony on it, so I will not go into it. But, the Marshall Commission and other studies certainly supported a longer period of time. This certainly has been one of the proposed regulations which I think would work to the disadvantage of the people. But let us move ahead.

Mr. TARR. Could I make one point on that, Mr. Chairman?

Senator KENNEDY. Yes.

Mr. TARR. It is true that we have cut the time in half in which the young man might signify that he would like to appeal. But we have not reduced the time in which a man can prepare for his appeal, and of the two, I think the preparation for the appeal is much more important than the time in which he signifies he is going to appeal. And as I say, I would have been swayed by comment that in specific cases there were young men who went through a considerable anguish trying to determine whether they should appeal. But there are no burdens upon a young man to appeal. It does not prejudice his case in any way. And as I say, the young men with whom I have talked, and I try to make it my business to talk with young people, have not indicated that they have any difficulty determining whether, in fact, they should appeal.

Now, the time of preparation for an appeal is something quite different. I think it is important that people have this long in order to prepare, because if a man has not been able to convince his local board, he may wish to bring some evidence, or new light that the local board did not explore. And this he should have the time to do.

One other point that I would like to make, and that is that the 30-day period was not extendable in the old regulations. The 15-day period in which young men might indicate a plea is extendable if the local board sees the conditions that warrant extension. Some people have criticized this and say yes, but local boards are arbitrary in this. I would only point to the fact that for the first time in the

history of the Selective Service System I am inspecting the activities of the local boards to see that, in fact, they are not capricious and arbitrary. And I would say we are not perfect, but we are trying to be better.

SENATOR KENNEDY. Of course, the second period of time would not do him much good if he had not indicated an appeal.

MR. TARR. It will if he had.

SENATOR KENNEDY. If he has not, it would not help—what did it used to be for those outside of the country?

MR. TARR. Sixty days.

SENATOR KENNEDY. Now what is it?

MR. TARR. It is 15 days extendable.

SENATOR GURNEY. What numbers are we talking about in these appeals? How many appeals did you have last year?

MR. TARR. I am sorry, I cannot answer the question. What we are talking about here are personal appearances before local boards, and appeals to State appeal boards and to national appeal boards as well.

As an indication, there are 2,000 appeals a year at the national level, and these involve only cases where there was a divided vote at the State level.

So, we are talking about many thousands of cases.

(The following more detailed response to Senator Gurney's question was subsequently submitted by the Selective Service System:)

The appeals, by fiscal year, are:

NUMBER OF APPEALS BY FISCAL YEAR

Year	Total	Presidential	State
1949.....	6,996	67	6,929
1950.....	2,267	35	2,232
1951.....	32,701	778	31,923
1952.....	51,044	1,755	49,289
1953.....	53,246	2,123	51,123
1954.....	48,438	2,369	46,069
1955.....	30,250	885	29,365
1956.....	12,814	408	12,406
1957.....	13,979	430	13,549
1958.....	10,571	170	10,401
1959.....	8,036	205	7,831
1960.....	6,427	171	6,256
1961.....	6,011	139	5,872
1962.....	8,558	224	8,334
1963.....	7,410	179	7,231
1964.....	9,579	205	9,374
1965.....	9,904	163	9,741
1966.....	50,516	798	49,718
1967.....	121,342	2,175	119,167
1968.....	120,006	2,171	117,835
1969.....	168,138	3,084	165,054
1970.....	136,256	2,286	133,970
1971.....	95,553	1,763	93,790
Total.....	1,010,042	22,553	987,489

SENATOR GURNEY. I wonder if you could furnish that for the record? Would you?

MR. TARR. All right.

SENATOR KENNEDY. You can go ahead.

Mr. TARR. Second, some have disputed the proposed regulation that concerns the 15-minute time limitation on personal appearances at local boards, the lack of the same time limit at State appeal boards, and once again the 15-minute limit at the Presidential board. Although it would have been more convenient to omit a time limit from the regulations, we decided that we must set a reasonable standard for the local board to insure the rights both of registrants and board members. The registrant must have the opportunity to be heard, while the board must have some protection against the registrant who wants only to harass. The 15-minute time was the best compromise we could reach. The Justice Department advised that we not impose this limit at the State board, while members of the Presidential board asked that we include it for them.

Senator KENNEDY. Why is that? Now, you have a difference obviously when the Justice Department says not to establish the time and the Selective Service does. Can you tell us why? What was the reasoning behind the Justice Department?

Mr. TARR. I do not know, Mr. Chairman.

Senator KENNEDY. Would your counsel?

Mr. MORSE. Mr. Chairman, I think the reason was that since an appeal before the State appeal board was an appellate right, there should not be a limit on the time allowed for the registrant. As to what the feeling of the presidential appeal board was as to why it felt it should limit the time, I do not know. That was a decision of the board. But we followed the advice of the Justice Department on the appellate rights.

(The following more detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

Attorneys for the Department of Justice expressed the view that members of state appeal boards were likely to be more experienced than members of local boards and thus should be given greater discretion in the conduct of personal appearances. Further, the personal appearance before the state appeal board would be appellate in character and the issues presumably would be more clearly defined. Thus, the registrant would likely receive a fair hearing without the necessity of a suggested minimum period of time.

The National Appeal Board requested that a 15 minute time rule be placed in regulations to facilitate the administration of its responsibility in conducting personal appearances. It was felt that extensive screening of the registrant's case had been done at the local board and state appeal board levels, and that therefore the issues were clearly defined by the time a case reached the National Appeal Board level. It should be emphasized that when circumstances dictate, the National Appeal Board may extend the time period of the hearing beyond the 15 minutes. For these reasons the National Appeal Board requested this time rule. Because it is an independent body not within the full span of my control, I acceded to the request believing that the distinguished men serving on that board are fully capable of judging how they can best be fair to all registrants while at the same time handling their enormous caseload.

Senator KENNEDY. You followed their advice? So, you do not have the time limitation?

Mr. MORSE. That is correct, to the State appeal board.

Senator KENNEDY. But you have it at the local level?

Mr. MORSE. Correct. They did not say it was not correct at the level to have a limitation.

Senator KENNEDY. What was your feeling about an appropriate period of time for representing appellant procedures at the local level? Is 15 minutes sufficient time?

Mr. MORSE. We felt it was sufficient; 15 minutes at the local level. As I say, the Justice Department took no exception to that, but they did feel it should be open-ended at the appellant level.

Mr. TARR. Mr. Chairman, I would point out only that obviously the local board can extend the time if they wish. One of the problems, obviously, that we face here—

Senator KENNEDY. Do you have some regulations on that? Do you have how they can extend the time, and how they are going to be guided, and would you make that available?

Mr. TARR. Yes. One of the things that we do face at the local board is that if we set a longer time, a registrant could demand that a longer time be spent with him, whether he was actually pursuing his plea or not. And we felt that we must set some kind of time that would be practical, and that prudent local board members could extend if they felt that the man had something that he did not explore in the time that he had.

(The following more detailed response to Senator Kennedy's question was subsequently submitted by the Selective Service System:)

Chapters 626 and 627 of the Registrants Processing Manual contain instructions to local and appeal boards on how to extend the fifteen-day time period to registrants making an appeal. The pertinent pages of the documents are 626-3, 627-2 and 627-3.

CHAPTER 626—APPEAL TO THE APPEAL BOARD

Section 626.1

WHO MAY APPEAL

1. The Director of Selective Service, the State Director of Selective Service of the local board of jurisdiction, or the State Director of Selective Service of the state where the local board which classified the registrant is located, may appeal from any classification action of a local board at any time prior to the induction of the registrant, or his reporting for alternate service.

2. The registrant may appeal to an appeal board within prescribed time limits, from any classification given to him by local board action. An initial administrative classification into Class 1-H cannot be appealed.

Section 626.2

TIME LIMIT WITHIN WHICH REGISTRANT MAY APPEAL

1. The registrant must file his appeal (and his request for a personal appearance before the appeal board, if a personal appearance is desired) within 15 days after the date the local board mails to him a Notice of Classification (SSS Form 110).

2. Any time prior to the date the local board mails to the registrant an Order to Report for Induction (SSS Form 252) or Selection for Alternate Service (SSS Form 155), the local board will permit him to appeal even though the period for taking an appeal has elapsed, if the local board is satisfied that his failure to appeal within 15 days was due to some cause beyond his control. When the local board grants an extension of time to appeal to the registrant, he may within the extended period also request a personal appearance before the appeal board. When the local board grants an extension of time, an entry will be made on page 2 of the Registrant File Folder (SSS Form 101), or page 8 of the Classification Questionnaire (SSS Form 100).

Section 626.3

PROCEDURE FOR TAKING AN APPEAL

1. Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. If the Director of Selective Service or the State Director of Selective Service appeals to the appeal board he shall place in the registrant's file a written statement of his reasons for taking such appeal.

2. Whenever an appeal is taken from a local board's classification by the Director of Selective Service or the State Director of Selective Service, the local board shall notify the registrant in writing of the action, the reasons therefor, and inform him that (1) his appeal will be considered by the appeal board for the area in which his local board is located unless he files, within 15 days from the date on the letter of notification, a written request with the local board that the appeal be considered by the appeal board having jurisdiction over the area in which is located his principal place of employment or residence, and (2) he may request a personal appearance before the appeal board if he files with the local board within 15 days from the date on the letter of notification a written request for such personal appearance. The 15-day period may be extended by the local board when it is satisfied that the registrant's failure to file a written request within such period was due to some cause beyond his control.

3. If the Director or state director has the registrant's file folder in his possession when the appeal is taken, he shall return the file folder to the local board (when the file folder is in the possession of the Director, it shall be returned through the state director) with a notice in writing that the appeal is being taken and the identification of the appeal board to which the appeal is being taken. If the Director or state director does not specify which appeal board the appeal shall go to, it shall be sent to the appeal board having jurisdiction over the area in which the registrant's local board of jurisdiction is located.

4. If the registrant is taking the appeal, he may also request an opportunity to appear in person before the appeal board and that the appeal be considered by the appeal board having jurisdiction over the area in which is located his principal place of employment or residence. The notice of appeal need not be in any particular form, but must include the name of the registrant and his request. Any notice shall be liberally construed so as to permit the appeal.

5. The appeal board for the area in which the registrant's local board is located shall consider the appeal of the registrant's classification unless the registrant has timely filed with his local board a written request that the appeal be considered by the appeal board having jurisdiction over the area in which is located his principal place of employment or residence.

6. The registrant may attach to his appeal a statement specifying the reasons he believes the classification inappropriate, directing attention to any information in his file which he believes received inadequate consideration, and setting out more fully any information which was submitted.

7. Prior to forwarding the registrant's file folder through the state director to the appeal board, the local board secretary will prepare the file and complete the procedures required for taking an appeal, to include the following:

(a) Issuance of Individual Appeal Record (SSS Form 120) to the registrant. When the appeal has been taken by the Director or state director, the reasons for taking the appeal will be stated in writing and attached to the SSS Form 120.

(b) Insertion of the reasons for taking an appeal in the registrant's file folder, if it was taken by the Director or the state director.

(c) Insuring that all documents in the registrant's file folder are arranged in chronological sequence, latest on top, except that the Registrant Questionnaire (SSS Form 100) shall always be the top document.

(d) Insuring that the registrant's file folder does not contain information which has not been reviewed by the local board, and if the local board does not reopen the registrant's classification, the file shall be sent to the appeal board.

(e) Insuring that the period for taking an appeal or requesting a personal appearance has expired.

(f) Insuring that an entry has been made on page 2 of the registrant's file folder, or page 8 of the classification questionnaire indicating the date of mailing the file to the state director for forwarding to the appeal board.

Section 626.4

REVIEW BY APPEAL BOARD

1. The appeal board shall consider appeals in the order of the registrant's vulnerability for induction or alternate service.

2. Upon receipt of the registrant's file folder, the appeal board shall check to see whether the registrant has requested a personal appearance before the appeal board. If no request for a personal appearance has been made, the appeal board may classify the registrant after 15 days have expired from the date of receipt of the registrant's file.

3. If a registrant has requested a personal appearance before the appeal board, the appeal board will notify the registrant of the date, time and place of his scheduled appearance and will mail him such notification at least 15 days prior to the scheduled appearance.

4. Should the registrant fail to appear as scheduled, except for good cause he establishes to the satisfaction of the appeal board, he shall not be given an opportunity to appear at a later meeting. The registrant must file a written statement of the reasons for his failure to appear at his scheduled meeting within five days after such failure, or the registrant will be deemed to have waived his right to an opportunity to appear at a later meeting. The 5-day period may be extended by the appeal board when it is satisfied that the registrant's failure to file a written statement within such period was due to some cause beyond his control. In any event, the appeal board shall not classify the registrant at the meeting at which the registrant failed to appear, unless the registrant had withdrawn his request to appear.

5. The registrant is entitled to such time for his personal appearance as the appeal board determines is reasonably necessary for the fair presentation of the claim. No registrant may be represented before the appeal board by anyone acting as attorney or legal counsel. The registrant shall not be entitled to present witnesses. If the registrant does not speak English adequately, he may appear with a person to act as an interpreter. Recording devices will not be utilized during any personal appearance before the appeal board.

6. At any personal appearance the registrant may:

(a) Present evidence.

(b) Discuss his classification.

(c) Point out the class or classes in which he thinks he should have been placed.

(d) May direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight.

(e) May furnish further information which he believes will assist the appeal board in determining his proper classification. Such information shall be in writing or if oral, shall be summarized in writing by the registrant and placed in his file. Such information shall be as concise as possible under the circumstances. A summary of the personal appearance may also be placed in the registrant's file folder by the board.

7. During a registrant's personal appearance there shall be present a quorum of the members of the appeal board, or appropriate panel of the appeal board, and only those members of the appeal board before whom the registrant appeared shall classify him. Classification of the registrant by the appeal board may take place after one of the following has occurred:

(a) He has appeared before the board.

(b) He withdrew his request to appear.

(c) He waived his right to an opportunity to appear.

(d) He failed to appear, without establishing to the satisfaction of the appeal board good cause therefor.

8. In reviewing the appeal and classifying the registrant, the appeal board shall consider the various classes in the order specified in Chapter 623. The appeal board shall not receive or consider any information other than the following:

(a) Information contained in the registrant's file folder as received from the local board.

(b) General information concerning economic, industrial, and social conditions.

(c) Oral statements by the registrant and written evidence submitted by him to the appeal board during his personal appearance.

9. After classifying the registrant, the appeal board shall prepare the Action by Appeal Board (SSS Form 120A). In the event that the appeal board classifies the registrant in a class other than that which he requested, it shall record its reasons on a Report of Information (SSS Form 110) which shall be signed by a member of the appeal board who was present at the meeting at which the registrant was classified, and this shall be filed in the registrant's file folder. The appeal board shall enclose SSS Form 120A in the registrant's file folder, make entries on the Docket Book of Appeal Board (SSS Form 121) indicating the determination, and transmit the registrant's file folder through the appropriate State Director of Selective Service to the local board.

Section 626.5

PROCEDURE OF LOCAL BOARD FOLLOWING ACTION BY APPEAL BOARD

1. When the registrant's file folder is received by the local board, it shall:

(a) Complete and mail SSS Form 110 to the registrant, together with written notification of the appeal board's reasons for the classification, if the registrant was classified in a class other than that which he had suggested. Send copy of SSS Form 110 to the Data Processing Center.

(b) Enter on the Classification Record (SSS Form 102) and the Registrant File Folder (SSS Form 101) or the Classification Questionnaire (SSS Form 100) the classification granted by the appeal board and the date of classification.

(c) Enter date of mailing of SSS Form 110 on the registrant file folder or the classification questionnaire.

(d) Enter the classification action on the Minutes of Local Board Meeting (SSS Form 112) of the next local board meeting.

Section 626.7

APPEAL STAYS INDUCTION AND ALTERNATE SERVICE

1. The local board shall not issue an order to report for induction, a selection for alternate service, or an order to report for alternate service either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any such form which has been issued either of those periods shall be canceled by the local board. Upon cancellation, the registrant will be notified in writing, and a copy of the cancellation will be placed in his file folder and noted on page 2 of the file folder, or page 8 of the classification questionnaire.

CHAPTER 627—APPEAL TO THE PRESIDENT

Section 627.1

PERSONS WHO MAY APPEAL TO THE PRESIDENT

1. The Director of Selective Service, the State Director of Selective Service of the state where the local board which classified the registrant is located, or the State Director of Selective Service of the state where the appeal board which classified the registrant is located, may appeal to the President from any determination of an appeal board at any time prior to the induction of the registrant, or his reporting for alternate service.

2. When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, he may appeal to the President and request a personal appearance before the National Selective Service Appeal Board within 15 days after the mailing by the local board of the Notice of Classification (SSS Form 110) notifying him of his classification by the appeal board. The local board may permit any registrant who is entitled to appeal to the President under this section to do so at any time prior to the date the local board issues to him an Order to Report for Induction (SSS Form 252) or an Order to Report for Alternate Service (SSS Form 153), even though the period of taking such an appeal has elapsed, if it is satisfied that his failure to appeal within such period was due to some cause beyond his control.

Section 627.2

PROCEDURE FOR TAKING AN APPEAL TO THE PRESIDENT

1. Any person entitled to do so may appeal to the President by filing with the local board a written notice of appeal. This notice need not be in any particular form but must identify the registrant and indicate that the classification is being appealed to the President. If the Director or a state director appeals, he shall place in the registrant's file folder a written statement of his reasons for taking the appeal. A copy of the notice of appeal shall be furnished to the state director for the state where the appeal board which classified the registrant is located.

2. If the Director or state director has the registrant's file folder in his possession when the appeal is taken, he shall return the file folder to the local board (when the file folder is in the possession of the Director, it shall be returned through the state director) with a notice in writing that the appeal is being taken.

Section 627.3

PROCEDURE ON APPEAL TO THE PRESIDENT

1. Whenever the Director or the state director appeals to the President, the registrant shall be informed on SSS Form 120 that if he desires to appear before the National Selective Service Appeal Board (National Board) he must within 15 days from the date on the SSS Form 120 request an appearance in writing, addressed to his local board. The 15-day period may be extended by the local board when it is satisfied that the registrant's failure to request an appearance within that period was due to some cause beyond his control. The local board shall promptly notify the National Board of the registrant's request to appear before it. The local board shall then forward the entire file to the State Director of Selective Service, placing copies of SSS Form 120 in the registrant's file. The local board shall enter on page 2 of the Registrant File Folder (SSS Form 101) or page 8 of the Classification Questionnaire (SSS Form 100) the date the file is forwarded.

2. If the registrant is taking the appeal, he may at the same time file a written request with the local board to appear before the National Board. This request shall be placed in the registrant's file and acknowledged prior to being forwarded.

3. When the registrant's file is received by the state director for forwarding to the President, the state director shall check the file to be sure that all procedural requirements have been properly complied with, including the issuance of SSS Form 120 confirming such an appeal has been taken. If he discovers any procedural error, he shall return the file to the local board for corrective action. When any information has been placed in the file which was not considered by the local board in making the classification from which the appeal to the President is taken, the state director shall review such information. When in his opinion, the information, if true, would justify a different classification of the registrant, he shall return the file to the local board with a request that the local board reopen and classify the registrant anew.

4. When the state director has complied with the provisions of the preceding paragraph he shall, unless the file is returned to the local board, forward the file to the Director of Selective Service: Attention: NSSAB.

5. If an appeal is withdrawn by the Director or state director, the registrant will be informed in writing. If an appeal or request for a personal appearance is withdrawn by the registrant, his withdrawal will be acknowledged.

Section 627.4

PROCEDURES OF THE NATIONAL SELECTIVE SERVICE APPEAL BOARD

1. An appeal to the President is determined by the National Selective Service Appeal Board (National Board).

2. The National Board shall classify any registrant who has not requested a personal appearance after the specified time in which to request a personal appearance has expired.

3. Not less than 15 days in advance of the meeting at which his classification will be considered, the National Board shall inform any registrant who has requested a personal appearance that he may appear at such meeting and present

evidence, other than witnesses, bearing on his classification. Should the registrant fail to appear at the scheduled meeting (except for good cause he establishes to the satisfaction of the National Board), he shall not be granted an opportunity to appear at a later meeting. The registrant must file a written statement of the reasons for his failure to appear at his scheduled meeting within five days after such failure, or he will be deemed to have waived his right to an opportunity to appear at a later meeting. If he establishes to the satisfaction of the National Board that he has good cause for not appearing on the date originally scheduled, he shall be scheduled to appear at a later date. His five-day period may be extended by the National Board when it is satisfied that his failure to file a written statement within such period was due to some cause beyond the registrant's control.

4. The registrant is entitled to fifteen minutes for his personal appearance. The National Board may, in its discretion, extend the time of the registrant's personal appearance. A registrant cannot be represented before the National Board by anyone acting as attorney or legal counsel. The registrant shall not be entitled to present witnesses. If the registrant does not speak English adequately, he may appear with a person to act as an interpreter. Recording devices will not be utilized during any personal appearance before the National Board.

5. At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. At the time the registrant requests a personal appearance he may furnish such further information as he believes will assist the National Board in determining his proper classification.

6. The National Board shall classify a registrant who has requested a personal appearance after (a) he has appeared before the National Board, (b) he withdrew his request to appear, (c) he waived his right to an opportunity to appear, or (d) he failed to appear without establishing good cause to the satisfaction of the National Board. When a registrant appears before the National Board, only those members of the Board before whom the registrant appeared shall classify him. Classifications will be determined by a quorum of the National Board or appropriate panel of the National Board.

7. In reviewing the appeal and classifying the registrant, the National Board shall not receive or consider any information other than the following:

(a) Information contained in the registrant's file folder received from the local board;

(b) General information concerning economic, industrial and social conditions; and

(c) Oral statements by the registrant and written evidence submitted by him to the National Board during his personal appearance. Oral statements by the registrant shall be summarized in writing by him and submitted for inclusion in his file folder. A summary of the personal appearance may also be placed in the registrant's file folder by the Board.

8. In the event that the National Board classifies the registrant in a class other than that which he requested, it shall record its reasons in his file. Upon the receipt by the local board of a written request from the registrant within 30 days following the mailing of a Notice of Classification (SSS Form 110), the local board shall furnish to the registrant a brief statement of the reasons for the decision of the National Board.

Section 627.5

FILE TO BE RETURNED AFTER APPEAL TO THE PRESIDENT IS DECIDED

When the appeal to the President has been decided. Minutes of Action Upon Appeal to the President completed, and the Docket Book entries recorded, the file shall be returned to the local board through the appropriate State Director of Selective Service.

Section 627.6

PROCEDURE OF LOCAL BOARD AFTER FILE IS RETURNED

When the file of the registrant is received by the local board, it shall:

(1) mail an SSS Form 110 to the registrant, and

(2) enter on the Classification Record (SSS Form 102), on the Minutes of

Local Board Meeting (SSS Form 112) and on page 2 of the Registrant File Folder (SSS Form 101) or page 8 of the Classification Questionnaire (SSS Form 100) the classification given the registrant by the National Board. Also enter the date of mailing of the SSS Form 110 on page 2 of the Registrant File Folder or page 8 of the Classification Questionnaire.

Section 627.7

APPEAL TO THE PRESIDENT STAYS INDUCTION OR ORDER FOR ALTERNATE SERVICE

The local board shall not issue a registrant an Order to Report for Induction (SSS Form 252), a Selection for Alternate Service (SSS Form 155), or an Order to Report for Alternate Service (SSS Form 153) during the period afforded the registrant to take an appeal to the President or during the period his appeal is pending. Any such form which has been issued during either of those periods shall be canceled by the local board, and the registrant will be notified in writing of the cancellation. A copy of the cancellation will be placed in his file folder and an entry made on page 2 of the Registrant File Folder or page 8 of the Classification Questionnaire.

Senator KENNEDY. I suppose you could frame it in such a way that they have a minimum amount of time.

Mr. TARR. That is what it is.

Senator KENNEDY. It is not a time limitation?

Mr. TARR. A minimum.

Senator KENNEDY. He is entitled to it. He is not entitled to any more unless they waive it, isn't that it, the time he is allowed?

Mr. TARR. That is right, but the board can extend it. There is nothing, obviously, that says that the board can talk to him only for 15 minutes.

Senator KENNEDY. And in that time he presents his witnesses, does he?

Mr. TARR. Yes.

Senator KENNEDY. And makes representations himself, files whatever reviews, and information, and material that he has brought with him, OK.

Mr. TARR. Finally, there is a question over the application of the *Mulloy* case to reopening. Mulloy was a Kentucky registrant who presented a claim for conscientious objection after his local board had classified him 1-A. His board heard his plea but later voted not to reopen his classification which would have granted him rights of appeal. The Supreme Court studied the Selective Service regulation that stated:

The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification. . . .

It concluded that the local board should have reopened the classification, had in fact done so when it considered the man's claim, and thus could not bar him from procedural rights.

Our prepublished regulation alters the words of the former regulation, stating that the local board "will reopen" rather than "may reopen" in order to eliminate any confusion about the requirement placed on local boards. It also substitutes "in the opinion of the local board" for "if true." Some critics have attributed this latter change

to a willful intent on our part to undermine the *Mulloy* decision. This is not so. Rather it is the result of my own concern over how the local board can apply the words "if true" to pleas for hardship and conscientious objection wherein very few of the allegations can be shown to be "true." The original regulation related most often to claims for occupational and educational deferments. Now decisions usually involve judgment rather than facts that can be proven true, and this judgment is the responsibility of the local board. What we meant was that in cases where the registrant's plea would warrant reclassification if the board considered the plea valid, then the actual process of weighing evidence brought by the registrant constitutes reopening. We still may have a problem of language, but we do not intend to circumvent a Supreme Court decision.

3. CONSCIENTIOUS OBJECTION

In the area of conscientious objection, there are three regulations disputed by those who represent organization concerned about conscientious objection, as well as the form on which the registrant makes his plea, the form 150.

The first issue relates to post-induction notice claims for conscientious objection. Our prepublished regulations now permit the local board to reopen a registrant's classification during a long postponement, but otherwise they prohibit the local board from doing so after a man has received his order to report for induction unless the circumstances are beyond the registrant's control. This prohibition was upheld by the Supreme Court in the *Ehlert* case involving a claim for conscientious objection, decided in April 1971.

Some draft counsellors want us to change this regulation to permit the local board to examine a claim by reopening, and thereby giving the registrant his rights of appeal, at any time up to the moment of induction. The Senate agreed upon this position for conscientious objection, in its bill that went to conference. The House, you will recall, did not agree. The language of the conference report states that "the Senate receded with the understanding that in unusual cases, local boards would have the discretionary authority of extending to such registrants a hearing on their late claims if the circumstances so warranted."

Senator KENNEDY. Now, do your regulations take that into consideration? I do not think that they do, if the circumstances so warranted. That is an exact quote from it.

Mr. TARR. I took it from the committee report.

Senator KENNEDY. The quote is correct, but do the regulations point that out? You are exactly right in terms of quoting the conference. I am not sure your regulations make that proviso. Do they?

Mr. TARR. Mr. Chairman, what the regulations do say is that in a long postponement, and I do not know how much detail you would want to go into as to what constitutes a long postponement, but in the case of a boy, for instance, who is inducted and his induction is postponed to serve in the Peace Corps, or in the case of a young

man who has a postponement in order to finish a semester or term in college, then 40 days before his induction he is able to bring to the board new evidence, and the board must reopen.

Senator KENNEDY. Have you got the regulations in section E there? Have you got it right there in front of you on page 481?

Mr. TARR. "Provided, that in the event of paragraph (d) or (e) of this section of the classification." Now, Mr. Chairman, (d) is upon written request of the registrant.

Senator KENNEDY. Yes.

Mr. TARR. And (e) is upon the motion of the board itself. "Provided, that in the event of paragraph (d) and (e) of this section the classification of a registrant shall not be reopened after the local board has mailed to such registrant an order for induction or alternate service or, in the event that the order to report for induction or alternate service was postponed and a subsequent letter from the local board establishes the dates for induction or for reporting for alternate service, unless the local board first specifically finds that there has been a change in the registrants status relating from circumstances over which the registrant has no control." Now, there is another regulation that governs the setting of times in a long postponement for induction, but the effect of these two coupled together is that in a long postponement, the local board must reopen, if the registrant brings new information according to the *Mulloy* decision, and that if he brings it more than 40 days before the date of his induction set by the local board.

Senator KENNEDY. The only point here, and we really had better move on, is that as I understand the report language, it does not talk about late claims, it talks about if the circumstances so warranted, and opens up a broad range of different kinds of possibilities. Yours is much more restrictive. Let us move on, but I would expect that you would probably have some litigation on that.

Mr. TARR. Mr. Chairman, the only points that I have tried to weigh in my own opinion is what would the House have disagreed to if a liberal interpretation is placed upon this phrase in the conference report. I think the position of the House conferees is that you must set some time beyond which people no longer can contest their inductions by delayed claims. So obviously one has to balance what is in this sentence with the adamant position of the House conferees, and what ultimately emerged in the language of the law, and I have tried to do this by taking into account the long postponement.

Senator KENNEDY. Well, why don't we continue then.

Mr. TARR. Second, some critics have judged that our prepublished regulations do not carry out the requirement of the law that the alternate work program be administered by the Director of Selective Service. Before passage of the recent legislation, the Military Selective Service Act placed this responsibility on the local board. There is no question that the Director now must be responsible for the work program, although the law still requires that the local board order the registrant to work.

In studying this particular amendment, I tried to determine how I could control what actually is done and still find sufficient num-

bers of jobs for conscientious objectors. Obviously these jobs exist in communities in each State, and they are known best to State directors and employees of the System in local offices. Perhaps this is what Senate conferees had in mind when they asked that the director continue to rely upon local experience and arrangements. Furthermore, jobs often remain open for a very short time, so that if we wait for cumbersome clearances such as those required if every contention must be settled at national headquarters, then our chances for placement diminish substantially. Recognizing these necessities, I have decided to hold State directors responsible for the placement of men into alternate service positions.

I feel confident that the visitation of my representatives to State headquarters and the reports I receive will make it possible for me to administer the alternate service program more effectively than I could if I were to centralize the administration entirely in Washington. I am certain I will place people more effectively in this way. Also, I have started to develop national programs with church groups and organizations that offer the possibility for placing considerable numbers of conscientious objectors, and these will be administered by my office.

Third, there is criticism that the State director, by waiving the criteria regarding the pay for an alterante service job, really has the power to compel a man to accept a starvation wage. At the outset, let me say that the State director has no authority to order a man to a job in the 60-day period in which he is free to look for himself; those who place themselves need not worry about what kind of job the State director may find for them. Additionally, it is not always possible that the State director will find sufficient numbers of jobs for all conscientious objectors that will provide a standard of living reasonably comparable to what the man would have enjoyed had he joined the Armed Forces, given present levels of pay in the services. Much as we would welcome this, we cannot guarantee it. If we were to make it mandatory that the State director assign men only to jobs with pay comparable to that in the Army, then in many areas the State directors would be inhibited severely from making placements. Accordingly I intend to supervise the work of State directors closely. It is my responsibility to make certain that no manager in this System conducts himself in a cavalier manner.

Now let us discuss briefly the form 150. We have needed a new form since the *Welsh* decision in June 1970. I delayed writing one, awaiting amendments to the law, but now I must publish something soon. Because the form attracts so much interest on the part of many registrants. I published it in the Federal Register for public comment. I did not do so because I considered it a regulation. I have received 19 letters that now are being evaluated. I can go into details concerning this form if the committee desires.

4. GOVERNMENT APPEAL AGENT

Mr. Chairman, in your letter to me you asked that I discuss with you the abolition of the post of Government appeal agent. We have

had several problems in connection with this position, the most important being the responsibility that the official had both to the local board and to the registrant. Critics of the System have complained about this dual responsibility for many years. Some time ago the Committee on Ethics of the American Bar Association took the position that they no longer could agree to a lawyer serving both clients. Members of this subcommittee suggested a serious conflict of interest inherent in the post. Under these circumstances, we decided to abolish the position.

Senator KENNEDY. I must say the recommendation of this committee was the establishment of legal counsel.

Mr. TARR. Well, but with responsibility only to the registrant.

Senator KENNEDY. Yes. Sorry, but even the chairman of the Armed Services Committee in his explanation of the section indicated that he thought the Government appeal agent had a very important role to play. Now, you not only do not permit legal counsel, but you also have abolished the appeal agent too.

Mr. TARR. But which transferred his responsibility with respect to the registrant to the adviser to the registrant.

Senator KENNEDY. Adviser to the registrant, and does he—

Mr. TARR. Well, we now have emphasized that we appoint men and women who can advise registrants of their rights and responsibilities who will have some awareness of our law and our regulations, and we hope to have a training program that will prepare these people for this responsibility. There is no question that they are accountable only to the registrant and what they learn from the registrant they keep in confidence.

Senator KENNEDY. How many advisers to the registrant do you have?

Mr. TARR. Over 7,000.

Senator KENNEDY. And how many boards?

Mr. TARR. 4,100.

Senator KENNEDY. Does every board have an adviser?

Mr. TARR. No; some do not.

Senator KENNEDY. What percent do?

Mr. TARR. I cannot tell you that, Mr. Chairman, but part of our problem here is that we have used the post of adviser to registrants in many States in order to prepare people for service on local boards. It is an excellent training place for people who are breaking into the system, and thus when the new law began to apply at the first of the year, and many of our local board members, about 3,500 of them, were retired from the system, there were in some cases rather wholesale appointments of advisers to registrants to the position of local board membership.

Senator KENNEDY. As I understand, in your publication, in the follow-up in the recommendations to the Selective Service Youth Advisory Committee, you point out here that Government appeal agents, should be responsible only to draftees. And then you talk about, in the spirit of the committee recommendations, the general counsel is working on language of Selective Service regulation to

insure the Government appeal agent is of even greater assistance to the registrant, and at the same time continues to provide procedural advice to the board. And now we find that they have been abolished.

Mr. TARR. Well, we finally decided that our position of dual responsibility would not really work effectively.

Senator KENNEDY. Are these advisers paid, or do they serve voluntary?

Mr. TARR. All voluntary.

Senator KENNEDY. And you cannot tell us what percentage of the registrants do not have any advisers then today, can you?

Mr. TARR. I cannot now.

Senator KENNEDY. Can you tell us when everyone will at least have some?

Mr. TARR. Excuse me?

Senator KENNEDY. Can you tell us when everyone will be covered? Do you have a program with a target goal as to when everyone will be covered?

Mr. TARR. Mr. Chairman, I have not set a target, but I am going to meet with all State directors in the middle of this month, and I am going to emphasize to them the importance of recruiting and training advisers to registrants. There is some more in the statement that reflects on what we hope to do here.

Senator KENNEDY. All right.

Mr. TARR. Many of our Government appeal agents either have become advisers to registrants or members of local boards. We intend to start a training program for advisers to registrants based upon instructional material that now is in preparation. We have worked out an agreement with the young lawyers section of the American Bar Association to recruit their members to become advisers to registrants. Currently over 7,000 persons are serving in this way, and we are continuing recruitment.

Two more criticisms remain. First, why not require that at least one adviser to registrants be appointed to each local board? I cannot place this requirement on myself now without making it impossible for many of our boards to meet the standard. Some advisers to registrants have become local board members following the retirements brought about by amendments recently enacted. We have just completed extensive recruiting to provide members so that our local boards can operate.

Second, why not give the adviser to registrants the authority to order the reopening of a registrant's classification? This was an unusual grant of authority to the Government appeal agent, equal at the local board level to that of the Director and the State director. It could be justified because the Government appeal agent had a dual responsibility both to the registrant and his particular circumstances, and to the board and its previous handling of the registrant. The adviser to registrants does not have the authority to reopen a classification. But he can importune the State director to intervene, and he can do so to the Director as well. Frankly, I

believe that this is a sufficient check against abuse by the local board, coupled with the system of inspection that I have established.

AMNESTY

Mr. Chairman, you have asked me to address myself to the impact of amnesty on the Selective Service System. The President has given his views on amnesty in a news conference on November 12, 1971, and more extensively in a conversation with Mr. Dan Rather of CBS on January 2, 1972. I do not wish to make further comment on the wisdom of the timing of any such expression of the President's pardoning power or any possible action that might be taken by Congress.

Perhaps I can be of some assistance concerning the administrative implications of a general amnesty.

First, I would like to emphasize that historically there has been administrative relief available for those who have evaded responsibility but later elected to serve. Thus, during the FBI investigation, many registrants submit to induction. Some men do so after indictment, others before the trial begins. No U.S. attorney or Federal judge that I know would refuse in the absence of unusual circumstances a young man the chance to volunteer for induction and thereby avoid prosecution.

Mr. Chairman, I would like to add that one advisor to these proceedings this morning told me about a case where he may be able to request service in lieu of a jail term. That option exists in our regulations now. So there is leniency in the System, some of which already causes uneasiness among those who report promptly when they are called for induction. Recently we have seen a small increase in the numbers of men who return from hiding or Canada or some other sanctuary to volunteer for induction and avoid the penalty of a felony. Thus considerable relief is provided and has been available for many years.

With respect to a general amnesty, the logical concern would be the ability of Selective Service to function. Several possibilities must be weighed. If the amnesty affected only those 300 or so men presently serving prison sentences, then inductions probably could continue but with some hard feelings among those ordered to report. If on the other hand, the amnesty made it possible for approximately 10,000 men who have been convicted since 1947, and 6,000 registrants who face possible prosecution, to return to the full rights of citizenship without any penalty, then it would be difficult to justify the continuation of inductions. Our youth could not understand such opposing policies. I am certain that it would be nearly impossible to maintain membership on local boards as well.

Finally, there is the alternative whereby amnesty is granted if the man serves the Nation in some way, apart from the armed services. This really would be an acceptance of selective conscientious objection, but it would be offered only to those who had evaded the law. I am not certain that such an arrangement would make impossible a continuation of inductions, but I have grave doubts about the

equity of doing so. Furthermore, the Nation would accept a precedent for permitting the evasion of selective service law that might some day be an unwelcome tradition. This policy also could affect the attitudes and the discipline among young men in the armed services.

In short, I believe that any widespread program of amnesty would be incompatible with the continuation of inductions.

Mr. Chairman, I will be happy to discuss these or any other matters with you, and I await your questions.

Senator KENNEDY. Thank you very much Mr. Tarr.

Perhaps we can start at the latter part, and try to follow the 10-minute rule so that we can get through. I have used most of my time, but I would like to just get into this last point, and then yield to the members of the committee here. I am sure they have some questions for you.

You indicated there the President has given his view on the amnesty, in the news conference of November 12, and also more extensively. Would you care to restate those views for us?

Mr. TARR. Mr. Chairman, would you mind if I read them into the record?

Senator KENNEDY. No, that is fine.

Mr. TARR. If I can just find them. On November 12, 1971, the question at a news conference was asked: "Mr. President, do you foresee granting amnesty to any of the young men who have fled the United States to avoid fighting in a war that they consider to be immoral?" And to this question, the President answered: "No."

Then on January 2d, 1972, Mr. Rather on a televised conference, said, "Mr. President, recently you were asked a question about amnesty. You were asked if you foresaw any possibility of granting amnesty to those young people who have fled the country to avoid the draft, and you had a one-word answer, which was 'No.' Since then some Congressmen, among others, have proposed allowing these young men who want to come back, and are willing to do it, to come back without punishment if they will take alternate service of 2 years or 4 years. Is there no amount of alternate service under which you could foresee granting amnesty?"

The President replied: "No. The question that I was answering in that conference that you referred to, as you will recall, followed one where I had talked about the withdrawal of our forces, and the question was prefaced with that, as I recall."

Mr. Rather responded: "It was."

And then the President said: "In view of the withdrawal, how about amnesty? And I said 'No.' The answer is at this time 'No.' As long as there are Americans who would choose to serve their country rather than desert their country, and it is a hard choice, and they are there in Vietnam there will be no amnesty for those who deserted their country. And as long as there are any POW's held by the North Vietnamese, there will be no amnesty for those who deserted their country."

"Just let me say, Mr. Rather, on that score, I don't say this because I am hardhearted. I say it because it is the only right thing to do. Two and a half million young Americans had to make the choice

when they went to serve in Vietnam. Most of them, I am sure, did not want to go. It is not a very pleasant place. I have been there a number of times. They are nice people, but it is not a pleasant place for an American to serve, and particularly in uniform. I imagine most of those young Americans when they went out there did so with some reluctance, but they chose to serve. Of those that chose to serve, thousands of them died for their choice, and until this war is over, and until we get the POW's back, those who chose to desert their country, a few hundred, they can live with their choice. That is my attitude."

Mr. Rather said: "At some future time, the door might be opened?"

And the President said: "We always, Mr. Rather, under our system, provide amnesty. You remember Abraham Lincoln in the last days of the Civil War, as a matter of fact just before his death, decided to give amnesty to anyone who had deserted if he would come back and rejoin his unit and serve out his period of time. Amnesty, of course, is always the prerogative of the Chief Executive. I, for one, would be very liberal with regard to amnesty, but not while there are Americans in Vietnam fighting to serve their country and defend their country, and not when POW's are held by North Vietnam. After that, we will consider it, but it would have to be on the basis of their paying the price, of course, that anyone should pay for violating the law."

Senator KENNEDY. Does that represent your own view, too?

Mr. TARR. Mr. Chairman, I would rather not express a view to the committee, but I will say that I have made a very similar statement at times past. I do not think it would be appropriate for me to talk about the wisdom of the President exerting his prerogative under article II, section 2 of the Constitution, when he already has spoken and when I am obviously a servant of his administration.

Senator KENNEDY. Well, then, could we move to his position in attempting to elaborate this to some extent. I would understand what he said was that as long as there is a war, and as long as American prisoners of war are being held, there will be no amnesty. Is that correct?

Mr. TARR. That is my understanding.

Senator KENNEDY. And that even at the end of hostilities, and after the return of American prisoners of war, he has stated that he would be willing to consider it, but that there would be some penalty attached to it.

Mr. TARR. This is my understanding.

Senator KENNEDY. And do you have any idea now what those penalties would be?

Mr. TARR. I have not.

Senator KENNEDY. Are you prepared to make any recommendations to him?

Mr. TARR. I think not, Mr. Chairman.

Senator KENNEDY. There is very little comfort that can be offered to any of the young people themselves. Perhaps some of these young

people actually left the country prior to the time of the *Welsh* decision, in which the Supreme Court of the United States broadened the law of the land to include deeply held moral or ethical beliefs concerning conscientious objection. I am sure that many young people are abroad because of these deeply held beliefs.

Now that the Supreme Court has taken the position they have, what kind of hope can be offered to those individuals? Are they to remain away from their homes and their families during this period of time, as long as the war continues, and there are POWs? Is there anything that could be done for any particular groups?

Mr. TARR. Mr. Chairman, those people, for the most part, are under indictment. There may be some who are not under indictment, and if they were, obviously they could petition their local board for a hearing on the basis of the changed requirements placed upon Selective Service because of the Supreme Court decision.

And my instruction to local boards in circumstances like those would be by all means give that man a chance for reopening his classification, and make the judgment on the basis of what the most recent interpretation of the Supreme Court is.

Unfortunately, most of the men who is a sense have fled the country for that particular reason, probably are under indictment.

May I add a point here? That is that our figures for those under indictment are much lower than published figures of people who have fled the country, and I perhaps am not the one to reconcile the differences between these figures; but, these men who are under indictment necessarily must make their case with the Justice Department, and the U.S. attorney, rather than Selective Service, and I would suggest that perhaps the Justice Department might be the people with whom some exploration could be made.

But, my own feeling is that this is a reasonable area for some careful consideration of leniency.

Senator KENNEDY. Is not one of the real problems that we are facing, as you pointed out in your comments, that if we grant amnesty to any individuals today who fled the country, that there is a concern among Americans about fair play. They are concerned that their brothers or sisters, brothers, rather, or sons served, and somehow these young people here have escaped that service?

And also, I suppose there is a feeling among political leaders and others as well, about whether this really is fair play.

And secondly, there is the question of the functioning or the continuation of the draft, if young men can, in effect, say, "Well, we will just go across into Canada, and come back under any sort of an amnesty." I suppose you must balance that against the fact that today in the political spectrum practically every political leader says that the war is a mistake and wrong. You have these young people who said it was wrong. A good deal before the political leaders, with certain notable exceptions, and were willing to undergo the separation from their families, from their loved ones, and the interruptions of their own education or careers. They left the country, may have been away up to 5 years or even longer.

I do not think that is a very pleasant kind of prospect, and I do not think many of the young people that have left have felt that they have enjoyed a free ride.

I suppose the basic question that is appropriate for us to ask, and I would think that the President has to struggle with this question given his statement and comments in the 1968 campaign about reconciliation and about bringing the country back together, is how much of a penalty are you going to ask?

I suppose a penalty could come in many different ways. The one we all think of, obviously, is the loss of any kind of freedom; yet I suppose the penalty for these young people is being separated from their families and being away from their loved ones, and probably living with the stigma of having fled for their future life. I suppose that the real question is, whether and how much of a penalty are we going to ask these people to pay.

It is important that the political leaders of today, and I say this in terms of my own party, were advocating the continuation of the war and the escalation of military involvement, and they now have changed. It is, a political writer said, as if the political leaders are asking for amnesty for their previous position, and they are going to the American people and trying to get it.

Obviously, I do not draw away from the significance and importance of that change. But what about those young men who are being separated from their families? I was just interested if you could, having given us the position of the administration. I am interested in your views as the Director of the Selective Service, and as one upon whom the President will rely for counsel and judgment. How do you personally balance these various considerations?

I know where you have to come out today. And I am not interested in pressing you in terms of that required position. But I think it would be of some interest to the great number of young people in this country who care so much about it. Also in fairness to the parents of those who fled as well as to those on the other side, I think I at least would like to have some kind of a feel for your own view. How significant do you think this is? And how important is it in trying to bring this country back together in the wake of one of the cruelest kinds of experiences for which all of us bear considerable degree of blame?

Mr. TARR. Mr. Chairman, I do have very deep anxieties about the problems that were caused by this war. I was not nearly as clairvoyant at the time when we got into these difficulties as many people suggest that they were at the time we went into it.

I did not foresee the difficulties that have prevailed, although I have always believed that the main difficulty in a democracy is when the Executive moves into an area of initiative without first formulating the total support of the people. That is imperative if you are going to succeed.

You will recall that this was part of the problem in the War of 1812. To a certain degree it was the cause of friction in the War with Mexico. You remember that President Lincoln won his first national notoriety with the spot resolution, wanting to know the spot on American soil where the blood was first shed in the conflict with the Mexican forces.

I have found it helpful in this area, which is obviously one of the great anxieties and of importance to see what tradition we have established already with respect to amnesty.

And I would respectfully suggest to the committee that you may wish to include in your hearing the report written by the people in the Library of Congress who help you. They have made this study that many of you have seen, I know. Unfortunately, as we look for historical precedent, we fail to find any kind of action as sweeping as many people believe should be applied now, so that after we read history we recognize that we are still living in 1972 and must set all precedents for the future. My own feeling is—

Senator KENNEDY. Mr. Tarr, just on this point—and I want to give you a chance to finish the thought—but after the Civil War we gave amnesty to persons charged with treason to the United States.

Mr. TARR. But it was a civil war, you see.

Senator KENNEDY. I do not know if many of the people thought they had committed treason at the time when it was granted.

Mr. TARR. It was granted, as you will recall, in several separate steps, it is my understanding, and the first action involved people below a certain rank and below a certain political level, and that was the one that Mr. Lincoln became involved with.

But, later it was broadened. But still, then, if we use the Civil War, we are still going to have to determine ways appropriate for 1972, or 1973, or 1974, or whenever.

My own feeling would be that hopefully when the authority for a draft expires, that the country can embark on a very careful examination of the whole problem, and at that time not worry about any impact it might have on inductions, because they are gone.

My own feeling is that this will be over in the middle of 1973.

Senator KENNEDY. Senator Hart.

Senator HART. Dr. Tarr, would you agree that if we had adopted a principle of respecting the conscience of an individual who demonstrated deep moral offense at the notion of fighting this particular war, that we would not have had so many in Canada?

Mr. TARR. Senator, I think there is no question about the fact that there are selective conscientious objectors in Canada.

Senator HART. All right, we know there are, and it is with respect to these men that we are concerned about amnesty, not the fellow that went to Canada because he stole the headquarters company cash fund, or something like that.

Mr. TARR. Senator, may I make a comment there? I think you have to be a little bit careful here to recognize that many people who have deserted from the Armed Forces have done it for the same motivations as people who have said they were not going to come in in the first place.

Senator HART. I am glad you said that, and I hope we all understand it.

Indeed, the depth of conviction may be even stronger when you have seen what actually goes on, when you have submitted to service.

This would be tragically locking the door after the horse is gone, but shouldn't we understand from the dilemma we now confront the need to modify, the existing Selective Service Act, if you could get the vote to understand that if we turn to a draft in the future that we should respect the individual conscience which is formed on the basis of a particular war?

Mr. TANK. Certainly, Senator, I think every one of us has powerful motivation of idealism in this regard, and I hope that I can represent the fact that I have them. The unfortunate thing about my job is that I am not able entirely to focus all of my attention with my idealism with respect to philosophy but am required to work with the system of local boards in which very difficult judgments need to be made with respect to whatever law the Congress and the President decide upon.

My own conclusion is that a system permitting selective conscientious objection would be almost impossible, I will say impossible, to operate in a system of local board judgments, such as the system that we now have.

There is a significant sector of opinion among these people who follow the problems and the plight of conscientious objection closely that would argue, and they have argued with me rather strenuously, that a man who gives his own plea of conscientious objection should be so classed.

There is a lot of merit to this argument, because it is very difficult to determine the sincerity of a man who makes this plea, and even more difficult to determine the basis of his sincerity with respect to objection to a particular war.

Now, on the other hand, it is a very difficult thing for a young man whose age is 18, to come before a group that is convened as a local board and tell you conscientiously that he is against all wars, because obviously he did not live through the war I fought in.

He knew nothing about the circumstances in Korea: these young men with whom we are working now, some of whom were born after the Korean war was over. So, I think I am quite aware of what the philosophical and theological difficulties are, although I do not profess to understand all of them.

I am not a philosopher, but I think I recognize the problem there, and I recognize the difficulties that young people have, and I think I am quite aware of the difficulties local boards have.

And all I can say is that this is the dilemma with which we have been working for 2 years in the best possible way we could.

If you would not mind, Mr. Chairman, I would like to read a short paragraph into the record of a statement that was made by Albert Einstein. You will recall that Einstein was a very sincere conscientious objector, a pacifist, who died worrying about the counsel he had given to President Roosevelt on the continuation of investigation into the atomic bomb and the development of it.

If I can find this, I would like to read the statement that Einstein made, and it is in his biography that recently I finished, by an Englishman named Clarke. (Ronald W. Clarke, *Einstein*, p. 489). It is a very

interesting thing. He is talking about conscientious objection with respect to Belgium at the start of World War II.

I should like to venture some additional remarks, however. Men who, by their religious and moral convictions, are constrained to refuse military service should not be treated as criminals. Nor should anyone be permitted to sit in judgment on the question of whether such a refusal is rooted in deep conviction or in less worthy motives. [Reading:]

In my view there exists a more dignified and more effective way of testing and utilizing such men. They should be offered the alternative of accepting more overseas and hazardous work than military service. If their conviction is deep enough, they will choose this course; and there will probably never be many of such people. As substitute work I have in mind certain types of mine labor, stoking furnaces aboard ships, hospital service in infectious disease wards or in certain sections of mental institutions, and possibly other services of a similar nature.

Anyone who voluntarily accepts such service without pay is possessed of remarkable qualities, and really deserves even more than merely being accepted as a conscientious objector. Certainly he should not be treated as a criminal.

Now, Mr. Chairman, I would not want to push the quotation too far, because obviously Mr. Einstein was talking about conditions in Belgium that are completely different from what we have here.

But, I think that if the Congress ever decides, in its wisdom, that we should pursue a course oriented in the direction of opening the opportunity for conscientious objection to a man who objects to this particular war, then we should not ask a local board to determine his sincerity, but should make the judgment on the basis of his willingness to accept some other kind, some other sorts of things that Einstein was talking about.

Senator HART. All right, Doctor. I would not make a bet that Congress is about to proceed in this direction because of last June when I offered an amendment to provide for selective conscientious objection, and after debate, got only 12 votes. And I do not think you would have strengthened the case a bit to have said instead of alternate service now provided for, those who are the traditional CO, and get the status, that you have to prove the sincerity of your conviction by digging coal for nothing. And I am very hesitant to seem to quarrel with a massive intellect like Dr. Einstein, but at first blush it just does not seem to be appropriate as the measure of determining what is a difficult factual question, if you have so strong a central conviction that to kill would be, if I could refer to the old-fashioned religion, a mortal sin.

Now, I understand the difficulty of the local board or anybody else determining whether the registrant has borne the burden of proof, but surely that would not justify our failure to seek to devise some means that would provide for the protection of the country if it is possible.

Now, am I correct that one who comes out of the traditional religious disciplines which we have always respected and recognized to be pacifists have a relatively easy burden of proof, the Seventh-day Adventists, the Quakers?

Mr. TARR. My understanding, Senator, is that they do.

Senator HART. Then the Court held, and in those cases where tradition establishes the proper position for them that all war is wrong, then the Court, rather recently held that one who entertained and could prove the belief that all war was wrong would not be required to show that it was the result of some formal religious discipline. Am I correct on that?

Mr. TARR. Yes.

Senator HART. Yes or no?

Mr. TARR. Yes, but I would like to add a question—or I mean a statement—and that is that it was not just that these were exempted by the 1940 act, it was all people on the basis of religious training and belief—you see what I mean—so it did not take a court case in that.

And the next step—

Senator HART. No, but it took a court case to pump from religious training and belief to no formal religious discipline.

Mr. TARR. Yes, the *Seeger* case in 1965.

Senator HART. Now, local courts make, or local boards, make that judgment, and the draftee has the burden of proof there. The difficulty of establishing the subjective feeling, I feel like is no less difficult than the case of the selective objector. In fact, I think we could argue, you could really test the veracity of it a little more effective when a man comes in and says, for these reasons, in this place and time, this outrages my conscience. Why do we allow the local board to handle the humanist opposed to all wars, but say that we cannot trust the local board to make the judgment with respect to the individual who seeks to develop the same kind of opposition to this war?

Mr. TARR. Senator, obviously, you have a continuum in that you raise the difficulty from easy to impossible, and there is no point at which I can say that the local board no longer can make a judgment or that up to this point they obviously make perfect judgments.

There is no question that local boards have had to assume a greater degree of difficulty with the *Seeger* case and now with the *Welsh* case. Part of the problem, however, is that Congress has written into the law that the profession must be on the basis of conscience and not ordered by one's attitude on social, political, or economic problems, not on a personal moral code.

And I think the difficulty is loading the local board with the more difficult judgment, that the man's profession is on the basis of conscience and not these others, when he opposes only one war.

But, I do not want to make it sound as if it is an easy judgment for local boards now. When I talk with local board members around the country, and I do this as often as I can, the question that will come up in 9 times out of 10 is Mr. Director, what are you going to do to make it easier for us to judge who is a conscientious objector, and to that question I cannot give a positive answer because it is a very, very difficult judgment.

Senator HART. Well, all this says to me is that the exception that has long been traditional in this country for the one who opposes

all wars, involves the very same outrage to conscience, as when you give them a gun to fight a war, right now, that they find, to find that same scruple. When we have gone to another draft law I hope we will not fail to provide for the selective conscientious objector, certainly not just because of the local draft board finds it a difficult case to resolve. I confess this sort of locks the door after Indochina, but I hope we do not forget our experience.

Indeed, would it suggest—since everybody gropes for a way to grant amnesty, and we realize that there is a difference in protesting by burning your draft card and by blowing up a building and killing people—that we have sort of a reverse process in that setup.

Instead of finding out if the man was a CO before you indict him, set up a process that will meet the young man as he comes in from Canada or wherever, and determine if the reason he did whatever he did was because his conscience was outraged by what society was demanding of him.

Mr. TARR. Well, Senator, all I can say is if that kind of a system is established, I hope I am not responsible for it.

Senator HART. Whatever system is established will not work with ease.

Mr. TARR. That is right.

Senator HART. But, I repeat, the difficulty of making the judgment does not excuse us from attempting to treat with a measure of justice those men who found something less, in my mind, than justice in the situation that compelled them to run off.

Thank you, Mr. Chairman.

Thank you, Doctor.

Senator KENNEDY. Senator Gurney.

Senator GURNEY. Well, Mr. Chairman, I want to commend the Director on a very fine and comprehensive statement. It seems to me that it indicates there are many changes that have been made in recent times in the draft law and its enforcement, and carrying out the workings of it that have made it fairer and more equitable, and work better for not only the country, but also the young men involved.

And I want to compliment the Director and his people for the work they have done.

It seems to me on this business of amnesty you really have a couple of points here: One, you have got two kinds of draft evaders, the true conscientious objector, and those that have decided that this particular war is not the right kind of war, or at least they do not want to go to it. Wouldn't you say that they fit into those two broad classifications?

Mr. TARR. Senator, I think that so long as you write into this first classification the ones that the chairman mentioned, those who were conscientious objectors under the guidelines that the Supreme Court now has given us in *Welsh*, who went to Canada before, or whenever, underground or wherever, and are indicted, but felt the way *Welsh* did. I say that there is that group, and the second group is the one you described, the ones against this war.

Senator GURNEY. The second group is what troubled me. Of course, there are the usual arguments of why should you grant amnesty to someone who has not fought, and we all heard about those, and people are very emotional on the one side or the other, but the thing that troubles me about all of this is I think this is the first time in the history of our country involving wars that there has been a proposal of granting amnesty while we were at war.

We have granted amnesty in many other wars, as has been pointed out here today. But, it seems to me that if we established a precedent of granting amnesty during wartime, when we are faced with a real problem, then I do not see how you could raise an army of draftees that would be effective if you established a precedent of granting amnesty during wartime.

And certainly if this occurred, as I think would be the inevitable result, our freedom certainly would be in jeopardy at some future time. I do not think it is in Vietnam, but in some other war it might well be in jeopardy, and we might not be able to survive if we have that sort of precedent.

The other thing that occurs to me is this: Again, if we establish that kind of a precedent, it seems to me if we say to people that it is all right if you judge a law individually, if the Congress or the State legislature or some other lawmaking body passes one it really does not matter, it is what you may decide is right or wrong about it, yourself.

Well, it appears that only one result is inevitable there, and that is anarchy, and I do not think that any government can exist under circumstances like that.

So, it seems to me that we have a much broader question involving this amnesty thing than the common, ordinary arguments that are always used. This is why I am opposed to it at this particular time. I think it would be entirely wrong, and certainly jeopardize our Defense Department, or freedom, and be wholly wrong from the point of view of a society's right to make laws and to enforce them.

I do not have any other questions.

Senator KENNEDY. Thank you very much.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I have a few questions of Dr. Tarr. Before I ask those I would like to ask you a question, if you do not mind.

Did I understand you to hint or suggest that those who fought against the Union in the so-called Civil War were traitors?

Senator KENNEDY. I said that they were labeled as such, as violating the laws, that is right.

Senator THURMOND. And would you call them traitors?

Senator KENNEDY. No; I would not.

Senator THURMOND. Well, I wanted to debate that with you, and I wanted to remove any insinuation because I got the clear impression that you said they were traitors.

Senator HART. Mr. Chairman, would you yield there?

Senator THURMOND, are you saying that the Confederates were responding to a deep moral conviction?

Senator THURMOND. I am saying that the Confederates were fighting for the rights of the State. The States joined the Union volun-

tarily, and they felt they had a right to withdraw voluntarily, and they fought for the States where they lived, most of them.

There were a few that fought on the other side, and to call those people traitors would be entirely out of order. There is no such thing, as the grandson of a Confederate veteran who fought in that war, as my grandfather being a traitor, and I would deeply resent it, and you know I would.

Senator HART. And I hope you did not misunderstand my question. I respect the conscience of your grandfather, and I am glad he was granted the equivalent of amnesty.

Senator THURMOND. Well, I want to say this, that was a different situation from now, and in this Vietnam war the States are still a part of the Union. Back then they withdrew and thought they were out of the Union, and were fighting for an entirely different cause. There is no comparison at all between the two. I heartily disagree with the Senator from Michigan on that point.

Now, Dr. Tarr, I have a few questions here I would like to propound to you. The effects of amnesty on those registrants who face induction is apparent.

You mentioned that it would be nearly impossible to maintain membership on local boards. Would you please elaborate on this?

Mr. TARR. Senator, I wrote that statement because I have had experiences now with several Supreme Court cases. For instance, after the *Mohammed Ali* decision by the Supreme Court a few boards simply resigned.

After the *Seeger* trial quite a few boards resigned. After the *Welsh* decision we had rather widespread resignations. In a way, since we have 17,000 board members, we can chart the cross section of opinion of our board members by the way in which they respond to public decision through resignation. I simply believe if we went forward with a program of amnesty at the same time we were requiring them to be responsible for inductions, many of them would simply resign and say I do not wish to do so.

Senator THURMOND. Dr. Tarr, approximately how many conscientious objector applications do you receive per 100 persons drafted?

Mr. TARR. Senator—

Senator THURMOND. Or per 1,000, if it is an easier figure.

Mr. TARR. Senator, I cannot tell you accurately what that is, but I can give you some information. We were watching applications for conscientious objection, and actions taken by the System on the basis of these pleas very closely in 1971. For the 6 months that we watched these we received some 12,000 to 14,000 applications for conscientious objection each month, which would put it over 100,000 a year.

And so for 1971 we received more applications for conscientious objection than we had inductions. I do not mean to extrapolate any particular judgment from that figure, but simply to respond to your question.

Of these 12,000 to 14,000 a month, our local boards and appeal boards were granting from 3,000 to 4,000 a month, which would place the number somewhere around 40,000 a year.

(The following more detailed response to Senator Thurmond's question was subsequently submitted by the Selective Service System:)

During the last period for which we have a selective service report, it was found that 110,708 registrants made an application for a conscientious objector status in some form. During that same period 164,644 men were inducted. This would indicate that 672 men made an application for a conscientious objector status, in 1-A-0 or 1-0, for every 1,000 young men who were inducted.

Senator THURMOND. Dr. Tarr, I agree that any such alternative duty should not be granted to just those who have evaded the law. There is no way we can justify the inequity, these proposals would create—what do you think of proposals to have all conscientious objectors serve such alternative duty?

Mr. TARR. Now, Mr. Senator, do you mean the people who have fled the country, who profess conscientious objection?

Senator THURMOND. Yes; or those who have evaded the law and fled the country.

Mr. TARR. Well, I think that insofar as these men were conscientious objectors under the guidelines given by the Supreme Court in the *Welsh* decision, that to ask them to serve periods, a period of alternate service as a stipulation of amnesty would only be requiring what they would have done, admittedly at a younger time in their lives, if they had been classified as conscientious objectors by their local board at some earlier time.

So, I would not have particular difficulty with that concept, but as I have noted in my statement, there are some difficulties with respect to precedents for the future that might arise if we included within the definition of conscientious objection the concept of opposition to a specific war.

Senator THURMOND. Of course, all of those who fled the country and went to Canada, or went to Sweden were not conscientious objectors.

Mr. TARR. I think it is important to remember that.

Senator THURMOND. How is that?

Mr. TARR. I think it is important that we remember that because of all of the people who have gone underground, or gone abroad, we can be positive that not all of them did so on the profession of conscience.

In every war in our history there has been a certain migration of people who simply wanted to avoid the burden of service.

Senator THURMOND. They just did not want to fight, and if they were conscientious objectors they had procedures here at home to have it ascertained that they were conscientious objectors. Instead many of these conscientious objectors evaded the country entirely and evaded their duty and let others do the fighting. Should we let them enjoy freedom when they return?

Now, Dr. Tarr, you have been aware of the complications that would arise from the publication of call notices, postponements and other actions by the Selective Service Boards in the "Federal Register." In contrast to the complications, what, in your opinion, would be the benefit from such publication?

Mr. TARR. Senator, I believe that we now are able to embark, with Executive Order 11623, on a policy regarding our regulations that is much more straightforward than was the case prior to its issuance.

When I came into Selective Service 2 years ago, we could only publish a new regulation after the President had signed an Executive

order. For this reason it was much more feasible for us to create rules for the agency under a regulation that existed, and I believe it is in connection—section 1604.1 of the regulations which makes it possible for the Director to prescribe certain rules for the agency.

And so, some matters that now will be placed in regulations heretofore were placed in local board memoranda, and also to State directors, local boards, telegrams to these people, and all the rest. I really think that now that we have gotten this interpretation from the Justice Department, and have the initiative to create the kind of rules that we think should govern the agency, that we now are prepared and will write these rules in the form of regulations in the future.

If that is done, then I really see no requirements to publish other things, except to make them available to the public, which we have already made plans to do with our registrants processing manual.

I think it is important that we follow all of the requirements of the Freedom of Information Act, and we mean to do this conscientiously.

So, beyond what now will be regulations themselves, I really see no point in prepublication.

Senator THURMOND. Dr. Tarr, in regard to my last question, I understand that you have received a letter from Mr. Ralph Erickson, Assistant Attorney General, and I believe that this letter will provide the members of the subcommittee with a great deal of insight into the inherent problems, and I request that you read and elaborate, if you wish, on this, for the benefit of the subcommittee.

Senator KENNEDY. It has already been made a part of the record, but obviously we can accede to Senator Thurmond's request, if he wants it read. It is already a part of the record at this time. It is a long letter.

Senator THURMOND. Well, Mr. Chairman, since it is a part of the record, you might just omit reading it and possibly you wish to elaborate on it, since it is in the record.

Mr. TARR. Senator, I have a statement in my statement that summarizes the letter that came from the Assistant Attorney General.

The elaboration that I would like to give on the letter is simply that I intend to follow his advice scrupulously with respect to those things that should be prepublished. I would like, not like to appear before members of this subcommittee as taking a position other than that. But I intend to follow the law. This is what I took an oath to do, and I intend to do it.

I was surprised when I received a letter from 23 Senators which gave their feelings on what the prepublication requirement was, and I have received similar comments from other people who have replied to our publication policies. Because of that I wanted to make absolutely certain that we had the best legal advice that we could gain in the Government, and for that reason we went to the Justice Department and asked for their letter that could be made a part of this record.

Senator THURMOND. Now, Dr. Tarr, we are glad to have you with us, and I want to commend you for the objectivity and the fairness with which you have administered the Selective Service laws.

Mr. TARR. I appreciate that.

Senator THURMOND. Thank you, Mr. Chairman. I have no more questions.

Senator KENNEDY. Just in reference to the question of prepublication: If you read, and I direct your attention to the Congressional Record of June 17, 1971, at S. 9358, where the chairman of the Armed Services Committee and I had an exchange on the floor of the Senate about the kind of things that should be prepublished. Any fair interpretation when reviewing that language would assume that LBM's, the local board memoranda, should be prepublished.

You can look down, and this is quoting Senator Stennis:

The Senator recalls that the court broadened the definition so that when the decision by the Supreme Court came out that called for issuance of the Director of the Selective Service at least for guidelines as to how the Director would apply and interpret the Supreme Court decision.

That was something that Senator Stennis thought was going to be published.

And you included those guidelines in your local board memoranda—that is not published—in LBM 107, and you have another example on local board memorandum 99.

Another illustration, if I may continue this, and this is Senator Stennis:

Even though we have a lottery system, a chance drawing up by numbers, nevertheless the national register issues regulations as to how they are going to break groups up as to age levels. These are those that are turning 19 and those that are turning 20, and so forth. That comes out in the form of regulations.

Now, that is what the chairman of the Armed Services says, that comes out "in the form of regulations," and yet you publish it in LBM 99, and you do not make them public. So, at least the chairman is telling the Members of the Senate what he thought was going to be prepublished, and we are acting on the basis of this.

Now you use a different interpretation. That is at least part of the reason why the Senate has written to you, because your interpretation quite clearly contradicts what I think any reasonable interpretation of the legislative history would be. We have here specifically two examples, one 107, and 99.

And it is quite clear that Senator Stennis felt at that time that those types of things were going to be prepublished.

Mr. TARR. Mr. Chairman, because Mr. Erickson goes over these matters with the most infinite care and patience in his letter, I am not sure that it is productive for me to comment further. But I will say that Senator McIntyre, who is also responsible for introducing this amendment, in the final argument with respect to the amendment that begins in the Congressional Record on page S. 9359, he makes the statement that one of the reasons for the publishing of the regulations is because local board memoranda that are not published perhaps then will not have to be so lengthy.

No one contradicted the obvious difference that Senator McIntyre drew to regulations on the one hand and local board memoranda on the other.

Senator KENNEDY. But I would think that certainly there is a re-

sponsibility to publish those LBM's that have general applicability. I think that Mr. Erickson's letter recognized that.

Mr. TARR. I think that is true.

Senator KENNEDY. And I suggest that certainly in these areas, your construction has been extremely narrow.

And I think that it certainly violated, as the author of that amendment, what we were trying to do in terms of notification. You have given us examples of where notification and prepublication has actually benefited the fairness and equity of the System. I think we are not talking about the narrow kind of housekeeping guidelines, but those that have general applicability for registrants.

And I think we expected that they would be prepublished. Just because you use another name for it does not really, you know, excuse that requirement.

Mr. TARR. Well, Mr. Chairman, I think I have already said to the committee that—

Senator KENNEDY. Mr. Erickson said the question is does it provide general rules of substance and procedure binding upon the public, or does it chiefly instruct the system elements on how to do their jobs. Certainly those that apply to conscientious objectors have general applicability, would you not agree with me?

Mr. TARR. But, Mr. Chairman, I think I have already told the committee that now that Mr. Erickson has given us what he thinks are the requirements of the law in this respect that I think we will follow them.

I have also pointed out that under the arrangement that existed before Executive Order 11623 that there was a considerable blurring between local board memoranda and regulations, and that now no longer need be the case. I think I have already conceded this to the committee, and I hope that the record will show it.

(See footnote 1 on this point prepared by subcommittee staff.)

¹ The prepublication controversy has sparked litigation resulting in two court decisions invalidating SSS directives for failure to comply with § 13(b) and the Freedom of Information Act: *Levi v. Tarr*, 5 SSLR 3523, 40 U.S.L.W. 2833 (N.D. Cal. June 1, 1972); and *Gardiner v. Tarr*, 341 F. Supp. 422, 5 SSLR 3329 (D.D.C. 1972). At issue in those cases was the validity of unpublished directives which purported to modify the rules under which conscientious objectors are called to perform alternate service. The courts in both cases ruled that the challenged directives (although denominated "Temporary Instructions" (TIs) and "letters to All State Directors" (LASDs)) were nonetheless "rules" or "regulations" under the Administrative Procedure Act and § 13(b); whatever the labels used by SSS, the directives "purport[ed] to be an authoritative declaration of policy issued for the guidance of the System's line officers." *National Student Association v. Hershey*, 412 F.2d 1103, 1115 (D.C. Cir. 1969); see *Levi v. Tarr*, *supra*, 40 U.S.L.W. 2833, 5 SSLR at 3526; *Gardiner v. Tarr*, *supra*, 341 F. Supp. at 434, 5 SSLR at 3333.

In defending its position in court, SSS had urged that it was following guidelines set down in an opinion letter by Assistant Attorney General Ralph E. Erickson, which was drafted in response to a request from SSS. (This opinion letter is in the hearing records of the subcommittee). The Erickson memorandum enunciated a three-part test for determining which directives must be prepublished:

- (1) What is the System's "expert characterization" of the document.
- (2) What is the "function" of the document; and
- (3) What has been the "past treatment" of the subject matter.

See *Gardiner v. Tarr*, *supra*, 341 F. Supp. at 435, 5 SSLR at 3333.

The *Gardiner* court ruled that even assuming the validity of the Erickson test, SSS violated that test by issuing regulatory material in various forms without regard to function or prior practice, thus seeking to make the publication status of a document depend exclusively on its label and not on its substance. See 341 F. Supp. at 435 n.7, 5 SSLR at 3333 n. 7. The court drew this conclusion from the last page of the Erickson memorandum, which states in part:

Obviously, Congress should not be deemed to have contemplated, in amending Section 13(b) so as to provide for the prepublication of the System's regulations, that material essentially the same as the previously issued as a regulation could henceforth be issued without pre-publication by the simple device of labelling it something other than a regulation. . . . An example of this would be the issuance as an LBM of a revised version of matter previously set forth as a regulation which is being repealed. In such a case, the pre-publication requirement of Section 13(b) should in my view be complied with.

Senator KENNEDY. What about the—excuse me.

Mr. TARR. You have given us the example of local board memorandum 107, and I will confess that there is some blurring between that and the regulations, but this was published in July of 1970.

Now, you have raised the issue of local board memorandum 99, and that was published in late 1970, and then published I think on November 9th or 10th of 1971.

Now, we showed this local board memorandum, which you will recall came before the letter which I received from the 23 Senators, so I showed this memorandum to Mr. Erickson, or to people in the Justice Department who work in his office, and the first time I asked them for their counsel on the basis of your letter they said, "Well, this is the place where there might be some blurring." My own judgment is that in the future I intend to make all rulemaking as regulations, and we intend to prepublish them.

Now, I really see very little that I can add in the record that indicates more fully what our intent is.

Senator KENNEDY. Would there be any reluctance on your part to publish the Registrants Processing Manual?

Mr. TARR. Yes, there would. It is voluminous. It is the kind of information that is intended to explain regulations to the local board. It will be available to the public for a nominal fee.

If people have criticisms of it they certainly can report that to me. There has been some criticism of one small portion of the Registrants Processing Manual that we are now in the process of changing, with respect to classification, but I would rather not be bound by a prepublication requirement on something as voluminous and constantly changing as that necessarily would be.

Senator KENNEDY. I have many other questions, and I would like to submit them, if I could, and I think we have come a long way.

I think what the record quite clearly shows is that the administration of the Selective Service, particularly as it operated over a period of time in the 1960's, was not fair and really not equitable in the selection of the young people in this country.

And the changes you have made in a whole wide variety of different areas show the progress that has been made.

In this review, we can quite clearly see the very serious, legitimate concerns that scores of young people have about how the system was set up, and how it was being utilized in selecting young people for the Armed Forces of this country. We are making progress, but I hope we can make further progress.

We have touched on some of the areas needing work here this morning, and Senator Hart has as well. I would certainly hope that what we could agree, in concluding this morning's hearings, is to set as a goal, a national reconciliation including all those young people who have been affected by the war. Many have lost arms and legs. Many have started to use drugs, many have been hurt from the psychological impact of the war, and also many have been hurt because they are excluded from their country. I think reconciling all of these individuals is really one of the great challenges which exists for this Nation.

I think it exists today, and I think it is going to exist on into the future, and I think it is going to take the best of all of us in reaching the goal of reconciliation for young people.

But I think although it only is directed toward the young, it is basic to the direction and sense of purpose of the Nation.

I want to express my appreciation for your appearance here, and for the comments that you have made, and I look forward to your responses to the questions to be submitted.

The subcommittee stands in recess until 2:15.

(Whereupon, at 1:20 p.m., the hearing was recessed, to reconvene at 2:15 this same day.)

AFTERNOON SESSION

Senator KENNEDY. The subcommittee will come to order. We will start off in the afternoon with our first panel: Mr. Karpatkin, Mr. Schulz, Mr. Shattuck, and Mr. Tuchinsky.

STATEMENT OF MARVIN M. KARPATKIN, GENERAL COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. KARPATKIN. Mr. Chairman, on the behalf of the American Civil Liberties Union, I am delighted to accept this invitation to appear here. I remember with great pleasure the appearance 2 years ago here when a group of us from the American Civil Liberties Union and the New York Civil Liberties Union appeared before the subcommittee and shared with the subcommittee some of the experiences we had had in the administration of selective service regulations.

I think it is first necessary to say for the record that in answer to your invitation, I have been excused from a trial today of an ACLU-supported Selective Service case currently pending in the U.S. District Court for the Southern District of New York.

The ACLU is now in its 52d year. Our organization has always been deeply concerned with the serious threats to constitutional rights and civil liberties which are inherent in any system of compulsory military training. It has been our abiding view that such total infringement of individual liberties—freedom to line one's own life, to work, to study, to marry, to have a family, to travel, to be subject to civil rather than military law—can only be justified in time of actual declaration of war or genuinely necessary national emergency mobilization. Nothing less, we have argued, can legitimize the act of any democratic government to compel its citizens to take up arms, risk death, and be commanded to kill other human beings, as a matter of national policy. We have, therefore, urged the abolition of the current draft, and argued its unconstitutionality in the courts, and we will continue to do so.

At the same time, however, we have been equally vitally concerned with the fair administration of the selective service system. I believe we gave before the subcommittee 2 years ago some of our rather dramatic experiences in terms of acquittal rates comparing the situation as it existed in terms of the persons we represented and the situation

that had existed 5 years earlier. Also on terms of national legal development, ACLU has been involved in every significant Selective Service case decided by the Supreme Court subsequent to the *Seeger* decision in 1965. Throughout all of this we pointed out not only the same observations which Senator Hart and others have made about the constitutional necessity as well as the wisdom of expanding procedural rights of conscientious objectors, we pointed specifically to the lack of right of counsel, to the lack of guaranteed right of witnesses, to the absence of an impartial tribunal, to the absence of a right to reasons for an adverse decision, to the lack of requirements for a quorum, to the absence of a record, and many, many other things.

We were therefore gratified when the Congress enacted into the 1971 draft law a small number of long-overdue procedural rights. The phrase, "procedural rights" introduces the section of the new law which gives these rights that had been absent from our selective service laws since 1940. The amendment recognized for the first time in more than 30 years that a young man facing the draft is entitled to bring witnesses before his local board; to appear in person before the local board; to have a quorum present and, upon request, to be given a statement of reasons for any adverse decision. It is ironic, of course, that Congress did not finally act to meet the widespread criticism of the Selective Service System until the war was winding down.

I submit, and this will be the essence of my testimony, it is even more ironic that the Selective Service System, instead of trying to implement the liberalizing intent of Congress, has promulgated a series of regulations, and taken other actions which amount to an effort to undercut the new law. My colleagues at this table and others who will appear today, including experienced draft counselors, scholars, writers and acute observers of selective service laws and their administration, will testify in some detail on the impact on American life of 32 years of conscription, and the bureaucracy which it has spawned. I believe Dr. Tarr mentioned this morning that there were some registrants that were not even born until after the Korean war. The sad fact is today that no one of draft age is old enough to remember that there was a situation when the United States was without a draft.

Of course the situation in our history has always been that we do not draft unless there is full-scale declaration of war or a true national emergency requiring it. Only since 1940, however, has the draft been foisted as a permanent system on the American landscape.

In any event, I will attempt to focus my observations on the phenomenon of truculent administrators resisting the implementation of the spirit and letter of reform legislation.

It is clear I think, Mr. Chairman, to any objective, impartial observer that the section on procedural rights in the new law was intended to be reform legislation, it was intended to change the previous situation, it was intended to improve the rights of regis-

trants. That was both the congressional spirit as well as the congressional letter in the words of the legislation. Indeed even the conference committee in rejecting some of the proposals of the Senate, unwisely in our view, but even in its rejection indicated the whole thrust and purpose of what was being done with procedural rights was intended to be reform and improvement.

One of the congressional reforms was the requirement that all regulations be "prepublished" in the Federal Register so that citizens should have an opportunity to see them and make comments before they take effect. This is no more than the normal procedure for regulations of the Federal Trade Commission, Food and Drug Administration, and practically all other Federal agencies. Selective service regulations have for years designated all official selective service forms as regulations, thus facilitating threats of prosecution of a young man who inadvertently or otherwise failed to conform with an official form, as being in violation of a selective service regulation, which is a crime.

It is interesting that Dr. Tarr talked about his new conscientious objector official form, yet there was no mention that the previous 14-page official form for conscientious objectors was not prepublished but simply leaked to various groups by Selective Service Director Tarr himself. Confronted with a barrage of protests about the form, Dr. Tarr announced that it would not be released in its current form, but reiterated that it would be released without prepublication. This was such a plain violation of the face of the law, that it is difficult to believe that it could have been approved even by Selective Service's own lawyers. The result was that the new revised form—a definite improvement—was prepublished, but, apparently to avoid any future impediments, the longstanding regulations giving official forms the status of regulations was revoked. By this devious route, the congressional purpose of disclosure is just as effectively frustrated.

I think it is worth while to focus in on this just one bit. The Erickson opinion letter which Dr. Tarr's statement says Selective Service intends to follow, has in the last paragraph on page 10 one caveat that is most relevant. The general thrust of the Erickson opinion is, in effect, that the Selective Service Director does not have to prepublish anything which is not a regulation. However, one warning on page 10 of the letter is where something had previously been a regulation, you cannot avoid the prepublication requirement by changing its status and starting to call it something other than a regulation.

It is just impossible for me as a lawyer, Mr. Chairman, to see how the continued promulgation of regulations without prepublication based upon the unilateral revocation of a 30-year-old regulation which said that every form is a regulation can still be justified as an avoidance of the prepublication process. I would very, very much like to hear what response Dr. Tarr and the general counsel would give to that.

Among the new procedural rights dictated by Congress included the right to bring witnesses to local board hearings, and the right to actually appear before appeal boards, which had previously op-

erated completely behind closed doors. Indeed it may be of some interest to know that it was impossible to obtain the address of the appeal board. Registrants seeking this had been uniformly advised that this information was not available. Indeed it was rumored that appeal boards never even sat, never even passed the papers around, but that they communicated by telephone if at all. And so we welcome the requirement that the appeal board come at least partially out of the closet and is exposed to the registrant and allow the opportunity for a registrant to appear before them.

Senator KENNEDY. Let me just go up to the top of page 3. Your point is that these LBM's still have a substantive effect on registrants.

Mr. KARPATKIN. Well, there are two parts to this, Senator. Clearly the intent of Congress as you pointed out in your attempt to refresh Dr. Tarr's recollection this morning on the debate in the Senate, was that all LBM's which had a substantive effect, which were in effect law and not just guidelines, had to be prepublished. His argument was, well, the debate is ambiguous and I have the Erickson letter to support me.

The point I am making is, and I think a much stronger one in terms of the record, a certain provision of the selective service regulations dating back probably to the 1940 draft and certainly at least to the 1948 draft had said that every official selective service form is regarded as a regulation. This includes, for example, form 150, the special form for conscientious objectors. Selective Service had a reason for this. This is the way it could force compliance because violations of a regulation is violation of a statute and violation of a form, which is not a regulation, is not a violation of a statute.

The question came up as to whether Selective Service has to pre-publish the form. Dr. Tarr claimed he did not have to publish the 150 form. I am sure somebody on his legal staff pointed out to him here is a regulation that says every form is a regulation. Whereupon, they simply adopted a new regulation revoking that 30-year-old regulation which said all forms are regulations. Mr. Erickson, who is now the Chief of the Office of Legal Counsel of the Department of Justice, observed as one caveat to Dr. Tarr that where something previously had the status of a regulation and was required to be prepublished, the requirement for prepublication does not terminate because you start calling it something else. And I submit that the argument here appears to be unassailable.

With respect to the 15-minute requirement, I think it is almost predictable, Mr. Chairman and Senator Hart, that the 15 minutes which are allowed for local board appearances will turn out to be a maximum as was indicated in your colloquy with Dr. Tarr this morning and it is likewise predictable that the absence of a 15-minute firm requirement for appeal boards will not have the effect of giving persons more than 15 minutes but will have the effect of giving such persons as little time as the appeal board chooses to give them and in all probability even less. I think you will find the appeal boards and the selective service administrators justifying this on the basis of the fact that the regulations say they are entitled to 15 minutes for

local boards but they don't say anything as to what they are entitled to before appeal boards. We would have preferred, of course, specific information in terms of both minimum and maximum, if you will, but at least specific—

Senator KENNEDY. Have you had any experience with the appeal boards?

Mr. KARPATKIN. So far as I know, no. Some of my colleagues may have but no one as yet has had a personal appearance before an appeal board.

Senator KENNEDY. Why not?

Mr. KARPATKIN. The new regulations, which were republished on January 12 just went into effect on February 12.

Mr. SCHULZ. They have been withheld pending these hearings.

Mr. KARPATKIN. Mr. Schulz probably has expert information on that.

Mr. SCHULZ. I don't claim that as expert information. That is my assumption.

Mr. KARPATKIN. So far as I know, no one yet has had a personal appearance before an appeal board but a number of registrants have communicated with their appeal boards requesting personal appearances and I believe the responses they received is that the regulation is not in effect and that the status quo will be followed until new regulations go into effect.

Senator KENNEDY. We should have found out when they expect to be finalized. Do you have any information on that?

Mr. SCHULZ. Sir, I do not. The last period was the November 3 to December 10 period. The first set of regulations went out on November 31, 1971. A lot of comments were received. They were all digested and most of those regulations published in final form on December 10, slightly more than a week after the 30-day period.

Now, we have from January 12 through February 12, had only a small number of comments, 12 or 15 comments, and yet there is no final publication yet. It was expected as of a week ago. I was informed by Public Information at National Headquarters that these final regulations would be published between the 19th and 21st of February. That plan has been given up.

Mr. TUCHINSKY. I spoke this morning preceding the start of the hearings with Mr. Kenneth Coffee, the head of the Public Information Office of National Selective Service System and asked him the question. He indicated they were holding back the implementation of proposed regulations in order to allow more time to examine the public comments they have received, few though they seem to be.

Senator KENNEDY. In spite of the fact that this was in conference in July last year, agreed to basically in August, signed in September, September 28, here we are talking about October, November, December, January, and February.

Mr. SCHULZ. Mr. Chairman, I can speak from personal experience about that period. As we all know, the conference agreement with respect to all of the amendments of the Selective Service Act except the Mansfield amendment was firm as of August 4 and the two

matters were certainly as of then to be considered separately, that is, there was no reasonable chance the agreements would be undone with respect to the amendments germane to Selective Service itself.

At that time I suggested at National Headquarters that it might be a wise idea to begin to draft proposed regulations since it was 99 percent certain that the law would be passed. And it finally was passed. That suggestion was not taken. As far as I know, no proposed regulations were even out until the end of September and then a preliminary set which were so inadequate that it wasn't even republished. It was revised and finally republished in November.

Mr. KARPATKIN. I think that in all respect to Dr. Tarr's attempt to justify the reduction of time within which he had requested personal appearance from 30 days to 15 days, doesn't meet the requirement of logic or the intent of Congress.

First of all, Dr. Tarr is just wrong as a matter of regulation when he says previously the local board did not have the authority to extend it beyond 30 days. There is specific selective service regulations which gives the board the authority and we can find the regulation number and put it in the record. And indeed, local boards freely us that. But we do indeed know what the affect of this is going to be. Many many boards refuse to extend the regulation and I know of one notorious instance involving a young man, a lawyer, working in a rural legal poverty program in a southern State who mailed his letter of appeal from the denial of an occupational deferment based on his work there. He mailed it on the 30th in a rural delivery box near where he was working. The last postal pickup had taken place 2 hours before he mailed it. His local board, and let it be said, Local Board 1, Smithtown, N.Y., refused to give him his right of appeal because it was one day late and this was sustained by the officials at the New York State Headquarters and the result was that this young man received an induction letter and I hope that the Department of Justice and the U.S. Attorney's office will show compassion which the local board and State headquarters did not show in that case.

There are many such instances. Indeed it was precisely because of situations like this that the recommendation of the Marshall Commission and others prevailed upon General Hershey to raise the time, to increase the time from 10 days to 30 days and it was precisely because of involuntary waivers of appeal rights and personal appearance rights. Now Dr. Tarr proposes to reduce it to 15 days. One might ask why is Dr. Tarr acting tougher than General Hershey?

There was some discussion, well, I guess something else has to be said about the appeal board and local board practices. Perhaps the provision of time requirements is going to do something about reducing the assembly line type treatment which many registrants have received. There was a famous decision by a Federal judge in Minnesota holding that due process of law was denied when an appeal board handled several hundred cases in a short period of time so that each registrant received only 59 seconds of appeal time. We know of cases where there were only 38 seconds of appeal. Local

boards are even worse. One case was where a local board presumably considered and acted upon 600 cases in 2 hours. That is approximately five cases per minute or 12 seconds per case.

I am sure there are even more outrageous examples. Perhaps the provision of these time requirements or indication of interest in time requirements will do something to remedy this.

(The following comment on Mr. Karpatkin's observation was subsequently submitted by the Selective Service System:)

Comment. In only one judicial decision in the United States, *U.S. v. Wallen*, 315 F. Supp 459 (U.S.D.C. Minn. July 2, 1970) was the simplistic mathematical formula applied of dividing the number of appeals heard into the total time elapsed during a meeting of a selective service appeal board and arriving at "per case time" of less than a minute per case thus resulting in a finding by the court that the defendant therein had not received due process. The formula used in *Wallen* does not, however, present an accurate picture of the time that is devoted to the consideration of individual cases of registrants whose appeals have substance and possible merit. In this connection, we should like to point out that it is a fact which is well known within and without the Selective Service System that inasmuch as all selective service registrants who receive a new classification have an absolute right of appeal to the appeal board having jurisdiction over their cases, a great percentage of registrants use their appeal rights as a means of temporizing, that is, gaining time without having any other reasons for the appeal or tendering any reason at all at the time the appeal is made.

This, of course, is a perfectly legitimate way in which a registrant may exercise his rights to postpone his availability for purposes of induction. Such a case, however, does not possess the quality of a matter requiring deliberation on the part of the appeal board. Since such pro forma appeals often make up as much as 70 to 80 percent of all of the cases before the appeal board at any given meeting, it is customary for an appeal board to lump them together and affirm the local board's classification therein, thus, enabling the board to spend an adequate amount of time reviewing the cases of those registrants who have submitted reasons and affidavits seriously challenging the classifications given to them by their local boards.

We are aware of only one District Court in the United States which has used the mathematical formula referred to above to demonstrate lack of due process to registrants on the part of the Selective Service System (*United States v. Wallen*, 315 F. Supp 459, District of Minnesota 1970). On the other hand, a number of other courts which have considered the precise question which was litigated adversely to us in *Wallen* have held that no such lack of due process occurred, including two Courts of Appeals of the United States (*United States v. Neckels*, 451 F. 2d 769, 9th Cir. 1971 and *Sajna v. LaFrance*, et al., No. 71-1602, affirmed by the United States Court of Appeals, 6th Cir., December 28, 1971). Thus, the *Wallen* case must be regarded as a sui generis vis-a-vis the numerous District Court decisions (not cited) and the United States Courts of Appeals decisions to the contrary.

There was some discussion about the impact of the *Mulloy* case and Dr. Tarr attempted to suggest he was being criticized unjustly about new regulations. I think it is important to understand what the *Mulloy* case was. It was a unanimous decision written by Justice Stewart. It held that a local board is compelled to reopen a classification thus giving valuable personal appearance and appeal rights whenever a registrant presents a prima facie case for a new classification.

It is not necessary for a registrant to prove his case to the hilt. It is not necessary to prove that his case fits the category of a preponderance of evidence or reasonable doubt. It is just necessary to present a prima facie case, to present facts which if true, would entitle him to a reclassification.

The congressional action was in the same reform spirit. If anything is clear from the procedural rights which Congress sought to guarantee in the 1971 act, it is that each registrant is to be entitled to a fair hearing and a fair appeal, and not to be denied access to the decisionmaking process. Yet the latest revised regulation—an earlier version would have cut off appeal rights even more drastically—authorizes reopening only when new material is presented which, “in the opinion of the board” would justify a change. Surely Dr. Tarr and his able lawyers know the difference between a *prima facie* case and proving one’s case completely. The effect of this regulation will be to bar thousands from having their cases even heard—by either local boards or appeal boards—unless they can first persuade the local board that they should prevail. This regulation, therefore, reflects resistance not only to Congress, but to the Supreme Court as well. It is as if a litigant in the court is told that you can’t have the right to have your case heard and tried by a jury and you can’t have your case appealed unless you have first persuaded the judge that you ought to win in the first place.

One further procedural right which the Senate approved, but which did not survive the Senate-House Conference Committee, was the registrants be allowed the right to be accompanied by counsel. Opponents of the right of counsel, including Selective Service officials, have always pointed to the regulations which provide for Government appeal agents, usually attorneys, whose duties include furnishing advice and assistance to registrants. There were many things wrong with the Government appeal agents in theory and in practice, and we have not been reticent in bringing to the attention of Congress, the courts, the bar, and the public the anomalous and unfair requirement of divided loyalty. We suggested to Dr. Tarr that a simple solution would be to provide that they should serve registrants only, since local boards can get legal advice from lawyers at State and national headquarters. We did not receive a specific response other than a thank you for the suggestion when we submitted this to Dr. Tarr. Yet, what do we have now? The new regulations simply abolish the position of the Government appeal agent and substitutes nothing in its place. There should be no mistake about it——

Senator KENNEDY. Was your impression of it adverse?

Mr. KARPATKIN. Senator, advisers have been with us. They were advisers provided for back in the 1948 law. Indeed it was compulsory for many years that advisers be available as well as Government appeal agents. Then some registrants started winning cases because Federal courts held absence of advisers to be a violation of their rights. Whereupon, they changed it and made the advisers optional. Such advisers continue to exist. The Marshall Commission had a great deal to say about the availability of these advisers and pointed out many local boards didn’t know who their advisers were. I don’t care what they are called, whether they call them advisers or whatever, but several things are essential. First, that they should be persons who are either attorneys or with legal training, as is the case with Government appeal agents. Second, that it should be

certain that there will be at least one assigned to each board. And third, that they should have at least the same power which the Government appeal agents had, which is the power to take an appeal at any time and the power to make a formal recommendation in the file for a presidential appeal or reopening. Any of these solutions, however, I submit would not really meet the problem. The only way the problem would be met would be if that provision of the Senate bill for the right of counsel would become law.

I know there is a report by the section on individual rights and liberties of the American Bar Association which makes these points in very very strong constitutional arguments and I take it that a copy of the letter from Mr. Turtle, the chairman of that ABA committee, has been brought to the attention of the subcommittee.

One other thing about the right of counsel. I had the privilege to argue before the Supreme Court of the United States the ACLU case of *United States v. Weller* which sought to establish as a matter of constitutional law that there was a right of counsel. The Supreme Court did not rule on the merits but remanded it to the 9th Circuit Court for jurisdictional reasons. The case will be argued there next month. But it was very interesting that Dr. Tarr made a comment in a talk where he reflected on that case—and I don't have the words before me but I can provide them: they are part of the Supreme Court record—he stated that we are aware of the fact that there are cases now pending in the Supreme Court which may make it necessary for us to make very very significant changes in our operations including changes with respect to the right of counsel. He assured all that if the Supreme Court decides we have to do this, we will certainly meet our responsibility and will be able to handle it. And I think it is perhaps important to bring to the attention of the Selective Service officials who might talk about the difficulties of providing counsel that when faced with the prospect of the Supreme Court decision, Dr. Tarr stated publicly that the Selective Service System would find some way to handle the problem of allowing registrants to be accompanied by civilian engaged counsel on their appearances before local boards.

Dr. Tarr said something about enforcement this morning which even though it isn't mentioned in my statement, I think should be responded to.

Would that it were so, that no registrant who has refused induction has his case presented to the grand jury and is indicted, until his case has been very critically reviewed to see if all of his legal rights have been granted him.

I don't know the extent to which this may be true in other districts but I have no hesitation in publicly stating that in the southern district of New York this is not the case. There have been a number of decisions recently where persons were prosecuted who never should have been prosecuted, where the prosecutions were dismissed by the judges at the conclusion of the Government's case, where prosecutions were clearly in violation of clear existing precedents. Personally I brought to Dr. Tarr's attention that the U.S.

Attorney's office in the southern district of New York appears to have a practice of not allowing men who are prepared to accept induction after indictment to accept it. The practice seems to be to compel them to plead guilty and after there is a felony conviction on their record to suggest to the judge that they may allow the now convicted felon to enter the service as part of his probation. This is an unnecessarily cruel practice, and I am glad that Dr. Tarr said he was going to investigate it.

Let me conclude by some observations concerning conscientious objectors. I simply cannot understand why it was necessary for the national Director to redelegate back to the State directors all of the powers which Congress said he should have with regard to alternative service jobs. It is quite clear to this practitioner why Congress wanted this to be centrally controlled. It is well known, for example, that the State of Mississippi and other States, that the State director has stated publicly that he will not permit alternative service jobs anywhere other than the most menial positions in State hospitals.

In the State of New York we have a notorious incident where a young man had a perfectly acceptable alternative service job and the draft board discovered, horror of horrors, that his job was only 47 miles from his place of employment instead of 50 miles and they pulled him out of that job and assigned him to work at Ellis Hospital hauling bedpans, et cetera, and not able to utilize his professional skills as a counsellor for disturbed children at St. Joseph's Hall, a highly respected institution run by the Diocese of Brooklyn.

In another case a young man was able to obtain employment as a clerk in the office of the American Friends Service Committee, which is a well-known subversive organization, in the minds of some people, I suppose. And I will submit for the record a letter written by an official in Selective Service, in which it states that the American Friends Service Committee opposes loyalty oaths in security programs, has supported nonviolence and has taken other positions which brought about controversy, and that a large majority of reasonable men are opposed to the actions of the American Friends Service Committee, therefore Selective Service feels that this individual should not work in an organization that a large percentage of reasonable people within the community disapprove.

Now, I must say Dr. Tarr's office comes out with high marks. When this was brought to the attention of Dr. Tarr's staff, it was straightened out and he was allowed to work some months later at the American Friends Service Committee office. But I submit it is precisely because of these decisions by State directors in various parts of the country interposing their own notions and values as to what is acceptable work or not that Congress directed this should be centrally administered by national headquarters where there will be some sophistication as to what is an appropriate job.

Now, Dr. Tarr proposes to redelegate all of the authority back to the State directors and I think that is bad.

Finally, we regard as the most outrageous regulation of all a brand-new provision that any conscientious objector assigned to an

alternative service job who fails "to comply with reasonable requirements of an employer shall be deemed to have knowingly failed or neglected to perform a duty required of him under the Military Selective Service Act," and "The registrant shall have failed to meet the standards of performance demanded by his employer or of his other employees in similar jobs." There are no misdemeanors or gradations of offenses under the act. Any violation exposes the registrant to a felony conviction, and up to 5 years in prison. To give this punitive power to a private employer is not only beyond anything intended by Congress but it seems to me is in violation of at least three constitutional guarantees against involuntary servitude under the 13th amendment, prohibition of criminal laws which are void for vagueness, and punishment without due process of law.

A provision of this kind invokes images only of slave labor camps or of compulsory work for the State where if you disobey the foreman or camp commandant or trustee in charge of you, you are not only in danger of losing your job, but of being criminally prosecuted and being sent to jail.

Senator KENNEDY. Now, let me just make the case the Selective Service would make just to draw you out a bit.

As I understand it, the employer feels that the registrant is not doing his job. He sends a report to the State director and then the State director sends the report to the registrant to reply. The State director investigates and then his decision is not appealable as I understand it. He files that decision with the U.S. Attorney and then the U.S. Attorney moves ahead to make an independent decision as to whether to go ahead and prosecute or not. Is that right?

Mr. KARPATKIN. Yes. It hasn't happened yet, but I presume that is how it would happen.

Senator KENNEDY. So, the U.S. Attorney makes an independent decision. But he is going to be guided by the rules and regulations of law, is he not?

Mr. KARPATKIN. Yes; but that is true also of any violation of the Selective Service laws or the Securities and Exchange Act or any other statute. The thing we are objecting to is the substantive creation of a new offense, the creation of a new crime.

Senator KENNEDY. He won't be guilty of a crime will he?

Mr. KARPATKIN. Of course he won't be guilty of a crime, but what is the crime? The crime is not of violating a military order, punishable under the UCMJ, the crime is not of violating a directive of a Government official. The crime is violating an order of a civilian employer. We are bringing criminal law into the employer-and-employee relationship. I don't know anywhere that this exists in American jurisprudence.

Senator KENNEDY. How bad a worker does he have to be?

Mr. KARPATKIN. Well——

Senator KENNEDY. Where are we on that?

Mr. KARPATKIN. There have been no prosecutions yet that I am aware of but I would not be surprised, Senator, if the American Civil Liberties Union would be instituting affirmative legislation to have it declared unconstitutional.

Mr. SCHULZ. It has been the experience of the past year or so in the civilian program that people who are "new culture types," long-haired people, and some of the new conscientious objectors are that kind of person, tend not to be reviewed well by their employers and they often are fired from their job or hassled by those who don't like that type person on the job. It is pretty clear you have an additional facet of discrimination, which is analagous to discrimination on the basis of race or religion, by the employer against the employee and he has a broad range of discretion here, a classic case of discretion, which is wrongful because there is a danger of of it being exercised discriminatorily.

Mr. SHATTUCK. Mr. Chairman, I am Jack Shattuck for the American Friends Service Committee and I would like to call your attention to one situation that has been revealed since September, at least the decision was handed down in October by the 10th Circuit Court of Appeals in *United States v. Burnes* which specifically issued that the man's attire, his long hair, and his attitude about what should be done about often when he reported to work were at question because his employer felt one way and he felt another and because of the disagreement, the employer decided he couldn't work for him and the young man was prosecuted and the Court of Appeals affirmed the decision with the understanding he had no say about how he should appear on the job. This was up to the employer as a normal situation. This was struck down after the September 28th act. Of course not under the new provisions as proposed this was a preview of what might happen. And in fact has happened in one case.

Mr. KARPATKIN. I think it is a fair accusation that Dr. Tarr and his advisers, with this regulation, totally without congressional authorization, are seeking to incorporate a militaristic regimen into the administration of what is supposed to be a civilian work program, I submit it is unbelievable that such an unconstitutional extravaganza which may be common in a totalitarian society, should have been conceived or approved by anybody, with any regard for individual liberty.

(The following comment on the witnesses' statements was subsequently submitted by the Selective Service System:)

The Tenth Circuit Court of Appeals opinion in *United States v. Burns*, 450 F. 2d 44 (1971), decided October 29, 1971, states most cogently persuasive justification for the prosecution of 1-W's who refused to conform their appearances to reasonable rules and requirements of their employers. In this case, *Burns* had reported to St. Anthony's Hospital, Denver, Colorado, as ordered by his local board and assigned to work as a physical therapist orderly. After appearing with long hair and in "dirty" unkept clothing, and upon refusing to "clean up" upon the request of his superior, he was transferred to the hospital laundry. Here *Burns* was again ordered to trim his hair and clean up on the threat of disciplinary action. *Burns'* response was that if this was the way it was going to be, he was leaving. At trial, *Burns* testified that his appearance was his own business and that he left the hospital with no intention of returning.

Later he informed his local board that he would not accept any order of the Selective Service System. The court in finding *Burns* guilty of knowingly failing or neglecting to report to civilian work in lieu of military service said that an exemption, limited or otherwise, for actual military service is not a constitutional right of a registrant but one of legislative grace. The duty of the registrant classified as a conscientious objector to perform his statutory obli-

gation is no less than that of those who are drafted to serve in the armed forces. The obligation of a conscientious objector duly assigned to civilian work cannot be avoided by deliberately refusing to comply with reasonable work rules and requirements established by an employer to whom he was ordered to report or by personal conduct which creates a situation intolerable to the employer.

Section 1660.8 of the regulations provide that, "Any registrant who knowingly fails or neglects to obey an order from his local board to perform alternate service contributing to the maintenance of the national health, safety or interest in lieu of induction or who constructively fails or neglects to obey such order by his failure to comply with reasonable requirements of an employer shall be deemed to have knowingly failed or neglected to perform a duty required of him under the Military Selective Service Act.

The registrant shall have failed to meet the standards or failed to perform satisfactorily if he did not meet the standards of performance demanded by the employer of his other employees in similar jobs."

In furtherance of the above, Section 1660.9(b) requires a State Director whenever he has reason to believe that a registrant refused or constructively refused employment, or was relieved for cause or left his job unjustifiably, to conduct an investigation which includes the following:

1. Obtain a statement from the former employer describing the circumstances and to furnish the registrant a copy of the statement.

2. Obtain from the registrant a statement in his defense if he wishes to make one.

3. To search for any additional evidence he feels may be relevant to the problem.

Based on his investigation the State Director will determine whether the departure was unjustifiable and whether the termination was for cause. Should he determine that the registrant's departure, constructive or otherwise, was without justification, he will report the registrant for prosecution.

But, this is not the end of the safeguards provided by registrant. Following the State Director's determination the violation is submitted to the Selective Service Regional Counsel for a legal review before referral to the United States Attorney (see Chapter 642, Registrants Processing Manual). The Regional Counsel will make an independent determination of the prosecutive merits of the case. Finally, should the Regional Counsel concur with the State Director that the matter should be referred to a United States Attorney, that officer will make an additional independent determination of the prosecutive merits of the violation. From this point there is still the necessity of processing the case through indictment and trial before the registrant is penalized for the violation.

In view of the above, we consider there are ample safeguards and allegations that Selective Service is bringing "criminal law into the employer and employee relationship" is unfounded. Further, in view of the above described legal review by Regional Counsels of the office of the General Counsel, the registrant will have the right to "assistance from the National Headquarters" contrary to Mr. Karparkin's statement beginning on line 8, page 109, of the Hearing held before Subcommittee on Administrative Practice and Procedure of the Committee on Judiciary, Monday, February 28, 1972.

Senator KENNEDY. I suppose your point as well is that he hasn't even the right to appeal to the national Director of Selective Service.

Mr. KARPATKIN. Yes.

Senator KENNEDY. He still won't even have that right, will he?

Mr. KARPATKIN. He won't even have the right to any assistance by administrators in Dr. Tarr's office.

Again let me say it has been my experience that if one can get a hearing on a true case of injustice and get it considered in Dr. Tarr's office, that injustice will be undone. That unhappily is not also the case at all State headquarters.

Let me say in conclusion, this bundle of repressive regulations may come as a jolting surprise to many who welcomed the change from General Hershey to Dr. Tarr. But whatever the political or other rea-

sons, the inescapable fact is that the Selective Service System appears to be systematically trying to take back a great deal of that which Congress was finally prevailed upon to grant. Unless public protests or court decisions force changes, the inevitable effect, in the words of the distinguished San Antonio attorney, Maury Maverick, Jr., will be to "turn young people away from the courts and into the streets."

Thank you very much. As I advised your assistant, after your questions I am going to have to ask to be excused.

Senator KENNEDY. I want to thank you. These points are excellent. They answer most of the questions I hoped to get in this morning and was unable to do so. I think that we are going to propose a number of questions to Mr. Tarr and would like to be able to consult with you to get whatever initial ideas you have on it.

Mr. KARPATKIN. We would be delighted to do so.

Senator KENNEDY. You and your organization have been enormously helpful in making the changes that have made the difference. Because of the work that has been done through your organization, we have been able to change the law, but unfortunately we have had some regressive steps again in proposed regulations. Some of the suggestions you have made here are enormously reasonable and rational and clearly express the sentiment of those of us who were involved in those changes.

We want to thank you very much.

(The full statement of Marvin M. Karpatkin follows:)

AMERICAN CIVIL LIBERTIES UNION,
156 FIFTH AVENUE,
New York, N.Y., February 28, 1971.

My name is Marvin M. Karpatkin. I testify today as a General Counsel of the American Civil Liberties Union. I am an attorney in private practice, a member of the firm of Karpatkin, Ohrenstein & Karpatkin, 1345 Avenue of the Americas, New York, N.Y. A considerable portion of my professional practice, as well as my volunteer work as an ACLU cooperating attorney, is in the area of selective service law and military law, and I also teach courses in these subjects as an Adjunct Professor of Law at New York University. In addition I am the current Chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York, although my testimony today is solely in behalf of the ACLU.

As a matter of fact, I am currently in the midst of a trial of an ACLU-sponsored selective service case in the Southern District of New York, and I express my gratitude to the presiding judge for his excusing me from the trial today, in order to be able to come to Washington to present this testimony.

The ACLU, now in its 52nd year has always been deeply concerned with the serious threats to constitutional rights and civil liberties which are inherent in any system of compulsory military training. It has been our abiding view that such total infringement of individual liberties—freedom to live one's own life, to work, to study, to marry, to have a family, to travel, to be subject to civil rather than military law—can only be justified in time of actual declaration of war or genuinely necessary national emergency mobilization. Nothing less, we have argued, can legitimize the act of any democratic government to compel its citizens to take up arms, risk death, and be commanded to kill other human beings, as a matter of national policy. We have, therefore, urged the abolition of the current draft, and argued its unconstitutionality in the courts, and we will continue to do so.

At the same time, however, we have been equally vitally concerned with the fair

administration of the Selective Service System. Over the past years ACLU lawyers all over the country have advised and represented thousands of registrants, and undertaken and supported extensive litigation, including the great majority of the Selective Service cases decided by the Supreme Court subsequent to the *Seeger* decision in 1965.

We were therefore very gratified when the Congress enacted into the 1971 draft law a small number of long-overdue procedural rights. That phrase "procedural rights," which is the title of a new section of the 1971 Act, provided, for the first time in the more than 30 years that the draft has been with us, that a young man facing the draft is entitled to bring witnesses before his local board; to appear in person before a local board and an appeal board; to have a quorum present; and, upon request, to be given a statement of reasons for any adverse decision. It is ironic, of course, that Congress did not finally act to meet the widespread criticism of the Selective Service System until the war was winding down.

But, I submit, and this will be the essence of my testimony, it is even more ironic that the Selective Service System, instead of trying to implement the liberalizing intent of Congress, has promulgated a series of regulations, and taken other actions which amount to an effort to undercut the new law.

Others who will appear today, including experienced draft counselors, scholars, writers and acute observers of the Selective Service laws and their administration, will testify in some detail on the impact on American life of thirty-two years of conscription, and the bureaucracy which it has spawned. I will attempt to focus my observations on the phenomenon of truculent administrators resisting the implementation of the spirit and letter of reform legislation.

One of the Congressional reforms was the requirement that all regulations be "pre-published" in the Federal Register so that citizens should have an opportunity to see them and make comments before they take effect. This is no more than the normal procedure for regulations of the Federal Trade Commission, Food and Drug Administration, and practically all other Federal agencies. Selective Service regulations have for years designated all official Selective Service forms as regulations, thus facilitating threats of prosecution for failure to comply with a form as a violation of a regulation. Yet a proposed 14-page official Form for Conscientious Objectors was *not* "pre-published" but simply "leaked" to various groups by Selective Service Director Tarr himself. Confronted with a barrage of protests about the form, Dr. Tarr announced that it would not be released in its current form, but reiterated that it would be released without pre-publication. This was such a plain violation of the face of the law, that it is difficult to believe that it could have been approved even by Selective Service's own lawyers. The result was that the new revised form (a definite improvement) was pre-published, but, apparently to avoid any future impediments, the long-standing regulations giving official forms the status of regulations was revoked. By this devious route, the Congressional purpose of disclosure is just as effectively frustrated.

Among the new procedural rights dictated by Congress included the right to bring witnesses to local board hearings, and the right to actually appear before appeal boards, which had previously operated completely behind closed doors. Yet the new regulations grant a mere fifteen minutes for an entire local board hearing, thereby rendering almost meaningless a right to three witnesses; and no minimum time *at all* is prescribed for appearances at appeal boards. To make things even more difficult, the previous 30-day time limit for requesting personal appearances and appeals has been inexplicably cut in half, to 15 days. It is interesting to note that under the administration of General Hershey, a previous 10-day time limit had been increased to 30 days, in response to many complaints that the very short period resulted in large numbers of involuntary waivers of rights to personal appearances and appeals. There are, unfortunately, many recorded instances of local boards refusing to honor a request which arrives even one day late, although the discretionary authority to do so exists. It is predictable that thousands of uninformed or

poorly informed registrants will be trapped by this switch. Why is Dr. Tarr acting tougher than General Hershey?

One of the most important Supreme Court Decisions of recent years was that of *Molloy v. United States*, decided in 1970 by a unanimous Court. It held, very simply, that a local board is *compelled* to reopen a classification—thus giving valuable personal appearance and appeal rights—whenever a registrant presents a *prima facie* case for a new classification. The local board must reopen, the Supreme Court ruled, even if it ultimately disagrees with the registrant's claim. The Congressional action was in the same reform spirit. If anything is clear from the procedural rights which Congress sought to guarantee in the 1971 Act, it is that each registrant is to be entitled to a fair hearing and a fair appeal, and not to be denied access to the decision-making process. Yet the latest revised regulation—an earlier version would have cut off appeal rights even more drastically—authorizes reopening only when new material is presented which, "in the opinion of the board" would justify a change. Surely Dr. Tarr and his able lawyers know the difference between a *prima facie* case and proving one's case completely. The effect of this regulation will be to bar thousands from having their cases even heard—by either local boards or appeal boards—unless they can first persuade the local board that they should prevail. This regulation, therefore, reflects resistance not only to Congress, but to the Supreme Court as well.

One further procedural right which the Senate approved, but which did not survive the Senate-House Conference Committee, was that registrants be allowed the right to be accompanied by counsel. Opponents of the right of counsel, including Selective Service officials, have always pointed to the regulations which provide for government appeal agents, usually attorneys, whose duties include furnishing advice and assistance to registrants. There were many things wrong with the government appeal agents in theory and in practice, and we have not been reticent in bringing to the attention of Congress, the courts, the bar, and the public the anomalous and unfair requirement of divided loyalty. We suggested to Dr. Tarr that a simple solution would be to provide that they should serve registrants only, since local boards can get legal advice from lawyers at state and national headquarters. Yet, a new regulation simply *abolishes* the position of government appeal agent and substitutes nothing in its place. The Selective Service System will undoubtedly contend that the regulations allow for "advisors" to registrants. But there is no requirement that "advisors" be attorneys or have any legal training, and, more to the point, the regulations do not require their appointment, but leave it optional. Many studies and cases have documented the total absence, invisibility, and, indeed, futility of the so-called advisors.

That small number of men who are granted conscientious objector status have been made special targets of the new regulations. In an attempt to assure some measure of uniform treatment, and to reduce the irrationalities of some local board assignments, Congress directed that the two-year alternative service requirement be administered by the National Director, rather than by local boards and state headquarters. In the new regulations, however, virtually all of Dr. Tarr's powers have been delegated back to the State Directors.

The Conference Committee rejected a provision of the Senate bill, which would have established a statutory right to file and have considered a conscientious objector claim which matured after the receipt of an induction order. Recognizing, however, that there might be at least some justifiable cases (as various United States Courts of Appeals had held) the Conference Committee stated its understanding that although no change would be made in the law, local boards would nevertheless "have the discretionary authority of extending to such registrants a hearing on their late claim if the circumstances so warranted." One searches Dr. Tarr's new regulations in vain for some assurance that the understanding of Congress will be implemented. There is some exceedingly obscure language in the latest revised regulation which may be claimed to allow for this possibility, but it defies the facts of life of local

board operations to expect that the Congressional intent will be understood and obeyed.

The most outrageous regulation of all is a brand-new provision that any conscientious objector assigned to an alternative service job who fails "to comply with reasonable requirements of an employer shall be deemed to have knowingly failed or neglected to perform a duty required of him under the Military Selective Service Act," and "The registrant shall have failed to meet the standards or failed to perform satisfactorily if he did not meet the standards of performance demanded by his employer or of his other employees in similar jobs." There are no misdemeanors or gradations of offenses under the Act. Any violation exposes the registrant to a felony conviction, and up to five years in prison. To give this punitive power to a private employer is not only beyond anything intended by Congress, but it is widely in violation of constitutional guarantees against involuntary servitude, criminal laws which are void for vagueness, and punishment without due process of law.

A provision of this kind invokes images only of slave labor camps or of compulsory work for the state where the failure to perform a job satisfactorily, or failure to meet the standards of the camp commandant results in application of a variety of penalties. Consider the implications of this provision. It is as if any employer who was dissatisfied with the performance of one of its workers could call upon the local district-attorney to prosecute the worker for failing to fulfill the employer's expectations. Would, for example, the Selective Service System approve a general criminal statute which gave the foreman on the assembly line of a General Motors plant the right to initiate prosecution against an assembly line worker who fell behind in his job of installing bumpers on automobiles? Can any of us really accept the idea that any employer, in a free society, should have the power to prosecute a worker for failing to meet his production standards?

This investment of a private employer with effective criminal sanctions is even more dangerous when we consider the not infrequent case of a difference in age, life-style and political and cultural values between an employer and a conscientious objector employee. Are young conscientious objectors to be sent to jail because of a dispute about a work rule, or hair length? Disobedience of orders is a crime only under military law. But Dr. Tarr and his advisers would, without Congressional authorization, incorporate this militaristic regimen into the administration of what is supposed to be a civilian work program. It is unbelievable that such an unconstitutional extravaganza, common perhaps in totalitarian societies, could have been conceived or approved by anyone with an even elementary respect for personal liberty.

Let me say in conclusion, this bundle of repressive regulations may come as a jolting surprise to many who welcomed the change from General Hershey to Dr. Tarr. But whatever the political or other reasons, the inescapable fact is that the Selective Service System appears to be systematically trying to take back a great deal of that which Congress was finally prevailed upon to grant. Unless public protests or court decisions force changes, the inevitable effect, in the words of the distinguished San Antonio attorney Maury Maverick, Jr., will be to "turn young people away from the courts and into the streets."

STATEMENT OF JOHN SCHULZ, EDITOR, SELECTIVE SERVICE LAW REPORTER

MR. SCHULZ. Mr. Chairman and Senator Hart, my name is John Schulz. I am editor-in-chief of the Selective Service Law Reporter, a compilation of statutory and judicial materials and the regulations of the Selective Service System. I have been in this job almost as long as Dr. Tarr has been at the helm over at national headquarters and through my office and contacts, I see simultaneously developments of the law here in Congress, of administrative and judicial develop-

ments, and am able to see how national headquarters juggles those and performs under the standards of traditional Selective Service practices and the standards of legal craftsmanship that I am familiar with.

Headquarters behavior over the past year and on into this year has been quite bad, as my written statement will demonstrate in some detail. Let me apologize for failing to prepublish my statement. I have bits and pieces of 10 or 12 ambitious topics all ready finished but the whole thing is not one piece yet. There is an awful lot to be added.

It is my experience in this field, which as you realize after this morning is extremely complicated, that the closer you get to it the more the unfairness in treatment of registrants looms large, and that is a problem in the context of legislative hearings.

It is boring and hard for folks to follow when you get technical, yet the way the Selective Service System operates, it behaves technically and the impact of that apparently technical behavior, is as Dr. Tarr conceded this morning, outrageous unfairness for registrants and a severe burden of inefficiency for the System itself.

My major concerns were spoken to by Mr. Karpatkin. I will go over them to some extent but beforehand I want to mention something I have just learned about in the last few days. Our office has received in the last month three reports of tampering with registrants' files in the Selective Service System, all of which have occurred since the 1971 amendment became law. One report in great detail is in a court decision. It is a CO case in which the court decided after evaluating the file that most of the reasons in the file had been forged and put in the file long after the decision was made and therefore there was no adequate reason for denial of the CO claim. This case called *United States v. Sobieralski* was decided on the 10th of December, 1971, in the Southern District of New York.

The court said in this opinion, and I quote, "What happened here is that the board didn't give any reason for its decision and belatedly, long after the even tried to straighten out the record by putting more papers in the file."

There were three samples of this that the court cited to justify that finding. First of all, the man's personal appearance had been held in July 1970. There was a summary of the personal appearance in his file which contained a notation, "reviewed under the new guidelines and the board feels the registrant is not sincere."

This statement the judge said, "I am inclined to think that that phrase was filled out later. It was not filled out when this form was submitted to the appeal board in December 1970, because I notice that pages two and three and four of the form each bear an appeal stamp but the first page does not bear that stamp."

His inference was that that page was put in after the appeal and thus lacked the stamp.

The second was a report of information, dated July 21, 1970. This also did not have the appeal board stamp on it although it was in the file. Also it was not listed in the minutes of the action on the back of the registrant's classification questionnaire.

Finally, after the registrant had refused induction and his admin-

istrative file was completely originally denied his claim; report of information was thorough statement of reasons months before.

(The following comment frequently submitted by the Se

Although Schulz alludes to three only the *Sobieralski* case incident *Sobieralski* case involved the additional board classification action before the case was forwarded.

Such a procedure is contrary to the Selective Service System. It corrected by reviews required and Procedural regularity is required. As part of the established made to assure that every proced

As a useful part of this system board, appeal board and administrative carefully check each file to assure that everything required before forwarding the case on appeal. Appeal board clerks are also required to carefully check each file to determine whether all steps required by the regulations have been taken whether the record is complete, and whether the information is sufficient to serve as a basis for the registrant's classification (32 C.F.R. 1626.23). When deficiencies are noted, files are returned to local boards with requests for additional information or action. When a file is reopened for classification purposes, the registrant receives notice. (32 C.F.R. 1625.12).

The system works well, general instructions, or regulatory changes affecting over 4,000 local boards and 96 appeal boards are not warranted because one or more local or appeal boards commit an undetected procedural irregularity in effecting an indispensable system of review.

Sobieralski was indicated in May 1971—months before the 1971 amendment became law. Any memo dated August or July 26, 1971, could not have been a contributing factor in any procedural error committed prior to May 1971. (PP. 116, Feb. 28 transcript of Senate Judiciary Subcommittee Hearing.)

The first two documents I mentioned are particularly objectionable, it seems to me. They are forgeries. In fact falsifying files is a felony. The only way a registrant can protect himself against something like that is to go to his local board, inspect his file and photocopy it with some frequency. Obviously this is impossible and terrible on the nerves. Registrants frequently live nowhere near their local boards.

Now, under the law the Selective Service System is required to state reasons promptly for its decisions. It seems to me that by regulation it would be possible to add an additional requirement of the same kind that the board inform the registrant promptly of every notation and document of any kind placed in his file. That is the only suggestion I can make to deal with this sort of problem.

The third document was accurately dated but it was included in the file long after the appeal. It thus could hardly contain an accurate account of the reasons for the board's action 6 months earlier.

Senator KENNEDY. You know, this is a very serious charge—

Mr. SCHULZ. Yes, sir.

Senator KENNEDY. Tampering around with these registrants' records.

Mr. SCHULZ. Yes, sir.

function the board review can kind of function of qualita-

Senator KENNEDY. Do you Board is involved in this Mr. SCHULZ. I will go category of letters to all possible errors in file boards in reviewing not to review file but simply prior. It is suggested that errors are to suggest it may be a mis- go and file even

Senator KENNEDY. Do you have any indication that the National Board is involved in this type of thing?

Mr. SCHEUTZ. I will get to this. There are two directives in the category of letters to all State Directors which set forth checklists of possible errors in files. At least one of them was to be used by local boards in reviewing files before they are sent to the U.S. Attorney; not to review files to decide *whether* to send them to the U.S. attorney, but simply prior to sending them to the U.S. attorney.

It is suggested in the other one that matters be corrected when errors are discovered. It is not said how matters will be corrected and it may be because of that ambiguity that boards feel it is proper to go and make corrections themselves by stuffing new reasons into the file at some later date.

In this case this statement of reasons was put in long after the appeal and personal appearances. The registrant had no idea of these reasons and cannot meet them in his administrative appeal. After his induction, at a time when the file was closed and when he could do nothing further on that file and when he was going forward to be prosecuted on the basis of that file, they were put in.

I wouldn't have mentioned that except that within the same week I received two other letters from a New York attorney about similar practices with respect to two registrants also in the Southern District of New York.

Now, I can't say about procedures elsewhere but three within 1 week all apparently dealing with changes required by the 1971 act concerns me greatly.

In the second case a board placed an "improved" statement of reasons in his file more than a year after it originally denied his claim.

In the third case the registrant was taking the action that I said a moment ago was not possible in most cases. He had gone down at a lawyer's suggestion to photocopy his file. He went down on November 26, 1972, and made a photocopy which then—on November 26—contained an entry for December 15, 1972, at least 3 weeks later. That entry said that a notice of classification was mailed to him on December 15. We know the importance of notices of classification and the date of mailing it. Now, he couldn't claim prejudice because the forged date was in the future but if these dates are entered in such a capricious manner, many people will not have even 15 days to claim their procedural rights.

As I said, there are memos to all State Directors from the Office of the General Counsel of Selective Service—I am speaking specifically about a Memo to all State Directors—GC-1, of March 3, 1971, and GC-7, August or July 26, 1971. In the latter, which contained a checklist of all sorts of procedural errors and other errors such as lack of basis in fact or failure to state reasons. This checklist noted which position would permit the Government to win and which answers to were losing answers for the Government. The directive contained the statement that State Directors were to reproduce it for use by local boards and in reviewing individual registrants' cover sheets prior to forwarding them to the U.S. attorney for prosecution, again, there is no direct instruction in this memo that files be tampered with as a means for correcting misprocessing but it certainly does not authorize a local board to make a decision not to forward a violation case. It says that a review is to occur prior to forwarding

the case to the U.S. attorney. What function the board review can serve I don't understand if it is not some kind of function of qualitative improving of the file at that late date.

This and the other matters that I will get to in a moment are examples of unfairness. Dr. Tarr admitted in his statement this morning, that there was gross misprocessing in the System over the last several years although things are getting better. I also think things are getting better, but if there has been such a severe misprocessing, training of members now won't help, inspection systems won't help for people who were misprocessed in 1969. Maybe amnesty is the only thing that will help. It seems to be not unreasonable to suggest that the Director of Selective Service make a judgment, since he has already conceded this is his view—that there was such severe misprocessing in the year or so before he took over and maybe even during his first year that a large number of people, an indeterminate number of people, went into the Army in ignorance but illegally and another large number of people are in some form of litigation possibly still awaiting indictment. There are thousands of cases pending now which are 2 years old. There are 25,000 violation cases already referred to the U.S. attorney in some stage of action, most of which deal with events 2 years old. It seems to me that the Director might well within his present powers cancel the outstanding induction orders of all of these people as well as develop a meaningful program with the Army to identify persons who were erroneously inducted and possibly permit people who deserted from the Army or who left the country before receiving their induction order to come back under some sort of administrative amnesty by canceling their induction orders.

I have a copy of the case with me.

The second point is much less severe in one sense but as a structural matter it at least is as distressing. There was quite a bit in your colloquy with Dr. Tarr this morning, Mr. Chairman, about rule 13(B) of the act, and the proper scope of its application. The Director indicated that there were some mistakes made, some directives which were regulatory in content, but issued by LBM, for example, rather than by regulation before he got authority to issue regulations himself on October 12 in Executive Order 11623.

However, since that time he has used the practice of issuing regulatory material in formats other than regulations. The most serious example of this is the initial establishment of the new 1-H, holding classification, which is a major change in Selective Service processing and which, by the way, has registrants all over the country terribly confused. We get cases all of the time from draft counselors and attorneys and from people who currently are being classified in 1-H, and don't know what it is about.

When the new system was first proposed, a brief reference was made in the November 3 proposed regulations. It was then said that people will be placed in class 1-H according to rules prescribed by the Director of Selective Service. No one was on notice as to what those rules would be. In fact, our office had some advance knowledge of what those rules were likely to be and were then asked by people where we had learned that, that it was not in the regulations. Now the New Registrants Processing Manual—the only copy of which not in captivity is now in my hand here—has a large and detailed

section, part VI, 622.18, which gives the detailed rules and standards for processing and classifying persons in class 1-H.

Section 622.18, of the Registrant Processing Manual, which was issued without prior publication and effective upon receipt, defines seven different types of registrants eligible for class 1-H and five types who are ineligible. This is a piece of rulemaking if there ever was one for as far as the personnel in the System are concerned, the RPM is going to be their bible from now on. They know this regulation but people outside the System have never even seen this and never received any kind of information from their boards as to what 1-H. means except a brief letter accompanying their 1-H. classification. This is an outrageous example of the continuing practice of headquarters in mixing rulemaking and substantive law changes with its so-called nonregulations documents.

Finally, let me say some words about the *Mulloy* case and its application to now-proposed section 1623.2 of the regulations. There is some kind of serious lack of legal craftsmanship at national headquarters if this simple and extremely straight forward Supreme Court decisions can't be understood now almost 2 years after it came down. The regulations provide for a reopening upon presentation of what is called the prima facie claim. A reopening is not a decision whether to grant a requested classification or not. It is simply a decision that the registrant has made some kind of showing, enough so that he is entitled to a complete hearing, including a personal appearance and administrative appeal. There is no personal appearance and administrative appeal from a denial of reopening. Thus the Supreme Court said:

"Whether or not a reopening is granted is a matter of substance, for with the reopening comes the right to be present personally and appeal. Therefore if refusal to reopen was improper, petitioner was deprived of an essential procedural right, and the order for induction was invalid."

The Supreme Court language wrote a gloss on the regulation which, as it then stood, was phrased in discretionary terms, that where a registrant makes know a frivolous allegation of facts not previously considered by its board, and which if true, would be sufficient under the regulation to warrant granting a requested reclassification, the board must reopen the case. Several months after the *Mulloy* decision, an LBM was issued which informed the System of this important decision. However, that local board memorandum after quoting the language I just quoted, made the following additional statement, "Particular attention must be given to insure that local boards observe the "if true" qualification in acting either to reopen or deny reopening of a classification"

This suggests that boards are to reopen if they think the registrant's claim is true and to refuse reopening if they feel it is false. Now, that suggestion is a total misleading of *Mulloy*. That suggestion calls for exactly the kind of preliminary evaluation of the right to reclassification or not which *Mulloy* prohibits until reopening has been granted preliminary with the right of appeal.

"The Government suggests that the Board may have concluded that the prima facie claim has been undercut by the Commissioner himself, by his statements, at the courtesy interview or because his demeanor convinced the board that he was not telling the truth. It is

precisely on such grounds as these that a board action cannot be predicated without a reopening of classification." In other words, the proper interpretation of the phrase "if true", as Mr. Karpatkin said, is as follows: for purposes of deciding on the reopening of classification, the local boards must treat all of the registrant's claim as true. Their actual truth as well as the right to entitlement under the claim will be determined only after reopening is granted when the hearing is held. With a personal appearance at the local board, the appeal to the appeal board, and the personal appearance there under the new rules.

When the regulations were finally amended on November third, it was disturbing to find that there will be no change in regulation 1625.2, although now the Director no longer had the excuse that the procedure of going through Presidential Executive order was cumbersome.

Finally, as has been proposed on January 12, this regulation was changed. Incredibly this proposal perpetrated the confusion I have just suggested. It now provides that the local board will reopen the classification of a registrant upon written request of the registrant when the registrant * * * presenting facts, which in the opinion of the board justify a change in the registrant's classification. Here the words, "if true" have been replaced by, "in the opinion of the local board." This language is again a direct invitation to the local board to evaluate the truth of the evidence presented at the time of a person's request for a reopening.

Mulloy, to repeat, specifically forbids this. Nor is the *Mulloy* decision based on the words, "if true." *Mulloy* is bottomed rather on the denial of procedural process which occurs if a board denies a man's claim because it thinks it is not true in the guise of refusing to reopen and thereby bars an administrative appeal of that decision.

And I submit that Dr. Tarr's statement today, which indicates his current understanding of the requirement of the *Mulloy* case, interpreted it in exactly the same way. Of course, C. O. Claims and hardship claims and are either true or not true. If a man alleges that he makes so and so much money, that his relatives make so and so much, that other relatives are unwilling to support his family, those allegations are true or not and those are the gist of hardship cases. If a man says he believes so and so about participation in a war, then whether or not he sincerely believes it is the ultimate question and that is a question of truth of his claim to believe such things.

Finally, I would quote the final paragraph of Mr. Erickson's memo as Mr. Karpatkin did, he says, "It seems to me that the system has not been following the requirement in that final section and that if it were to do so, it would go along way to curing the problems under section 13 (B)."

(The prepared statement follows:)

STATEMENT OF JOHN E. SCHULZ, EDITOR-IN-CHIEF, SELECTIVE SERVICE LAW REPORTER

I. INTRODUCTION

Mr. Chairman, my name is John Schulz. I am a lawyer and Editor-in-Chief of the Selective Service Law Reporter (SSLR),* a current compilation of judi-

* The Reporter is a project of the Public Law Education Institute, 6th floor, 1346 Conn. Ave. N.W., Washington, D.C.

cial, statutory, and administrative materials on the draft and the Selective Service System (System). I took this position in July, 1970, shortly after Dr. Tarr became Director of Selective Service, so that I have covered most of his regime. In my job, I have had a unique opportunity to observe National Headquarters' handling of both court decisions and statutory changes. Accordingly, my comments will focus on the adequacy of Headquarters administration during this period, particularly on facets of its informational programs, and its implementation of the amendments to the Military Selective Service Act (Act) enacted by Public Law 92-129 (September 28, 1971).

II. ADEQUACY OF INFORMATIONAL PROGRAMS

National Headquarters (Headquarters) disseminates information to two major audiences—system personnel, particularly local board members and employees, and the public, especially draft-age young men.

Over the last two years, performance of both these tasks has been less than adequate, as will be demonstrated below. Before doing so, however, I would like to show why it is important for these instructional programs to be properly administered.

A. General Consequences of Inadequate Informational Policies

If information is not quickly and accurately communicated to the System, both unfairness and administrative inefficiency will result. Thus, if local boards are misinformed about or left entirely ignorant of the requirements of law, policy, and court decisions, their processing of registrants is likely to be flawed. If so, many draftees will in ignorance be inducted illegally, which is unfair; those fortunate enough to be well-informed will seek administrative and/or judicial relief—often successfully—and thus have to be reprocessed.¹ This wastes both the System's and the courts' time, as well as that of affected registrants, who are furthermore likely to have to risk criminal prosecution in order to secure judicial review at all.

If information disseminated to registrants does not accurately and clearly inform them about their rights and obligations, they may again be misled to their detriment by failing to exercise rights established by Congress. The consequences are then much the same as above. Further, even well-informed young men will be uncertain as to their duties, which is especially cruel in a system that makes them felons if they guess wrong.

The remainder of this section examines in some detail crucial inadequacies in Headquarters issuances and directives of all kinds. An additional aim of this effort is to show why the Act was amended last November to require important directives to be published for a period of public comment before becoming effective. It will become clear that most of the problems discussed below *could have been solved* if the directive embodying them had been "pre-published." For one thing, Headquarters would have been alerted to their deficiencies during the comment period. Perhaps more fundamentally, it would have had an incentive to devote more care, thought and attention to policy decisions and the drafting of adequate language to reflect them. The scope of this publication requirement is the subject of part III of this statement.

The following comments focus on policies and practices in use during the regime of the present Director, both before and after the 1971 amendments to the Military Selective Service Act (Act); they also touch on some previous practices which he has not significantly modified.

B. Failure Adequately and Promptly to Disseminate Information About Binding Court Decisions

A continuing problem for Headquarters has been its failure promptly and adequately to inform the System of binding judicial interpretations of the Act and various classes of regulations. This applies both to Supreme Court decisions, which have nationwide impact, and Court of Appeals decisions,

¹ At the present time, some 80% of all alleged draft violations sent by the System to U.S. Attorneys are washed out without indictment, frequently because local board procedural errors are disclosed in the file. Such cases are returned to the boards for reprocessing. Interview with Walter Morse, Esquire, General Counsel of the System, January 1972.

As will be demonstrated below in some detail, many cases reach trial despite this screening, and are lost by the government because of the System's failure to observe binding court precedents, its own rules, statutory requirements, etc.

which are law within the multi-state judicial districts in which they are rendered.

1. Supreme Court Decisions

Among the former, the most important is *Mulloy v. United States*, 398 U.S. 410, 3 SSLR 3011 (1970). There, a unanimous Supreme Court interpreted a System regulation so as to restrict severely local board discretion to refuse to reopen a registrant's classification when he presents evidence of entitlement to a deferment. The relevant Regulation, 32 C.F.R. (hereinafter "R") § 1625.2 (1967), then read:

"The local board *may* reopen and reconsider anew the classification of a registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification . . . [Emphasis supplied.]"

Under the System's classification procedures, a decision to reopen is not equivalent to granting the requested classification; it simply makes available to the registrant a full hearing on his claim, including both a local board personal appearance and administrative appeal. Neither personal appearance nor appeal is permitted from a refusal to reopen. "Thus," said the Court, "whether or not a reopening is granted is a matter of substance, for with the reopening come the right to be heard personally and to appeal. . . . Therefore, if the refusal to reopen was improper, petitioner was wrongly deprived of an *essential procedural right*, and the order to report for induction was invalid." 3 SSLR at 3012 [Emphasis supplied].²

Because of the importance of reopening to procedural fairness, the Court wrote the following gloss upon the discretionary language of R1625.2:

"Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his Board, and that if true, would be sufficient under regulation or statute to warrant granting the requested classification, the Board *must* reopen . . . unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file." [Emphasis supplied] *Id*

"This is not to say that on all the facts presented to it [at a 'courtesy interview' given to Mulloy] the Board might not have been justified in refusing to grant the petitioner an I-O classification; it is to say that such a refusal could properly occur only after his classification had first been reopened." *Id* at 3013.

Mulloy was decided June 15, 1970. Despite its major significance for all classification processing, no attempt was made to inform System personnel of it until August 11, 1970.³

² Prior to *Mulloy*, as the opinion noted, "the Courts of Appeals in virtually every Federal Circuit" had ruled that reopening was mandatory on statement of a prima facie case. Note 3 of the *Mulloy* opinion sets forth such cases from 9 of the 11 Federal Circuits, all but the First (Northern New England) and District of Columbia (where no draft prosecutions are brought). Selective Service has ignored *all* these cases; local board reopening practice was thus illegal in 46 of the 50 states even before *Mulloy*!

³ In contrast, a directive summarizing the results of *Ehlert v. United States*, 401 U.S. 487, 4 SSLR 3001 (1971), was issued only two days after the decision was delivered. Local Board Memorandum (LBM) 111, as amended April 23, 1971, "to reflect the opinion in *Ehlert v. United States*. . . ." This ruling, sustaining Headquarters' interpretation of another part of R1625.2, may be considered a decision favorable to the System, which in part explains the laudable dispatch Headquarters showed in communicating it to personnel. LBM 111 construed *Ehlert* overbroadly, however, as disclosed by the report of the Committee of Conference on the 1971 Amendments to the Act. See Difference Number 4, Hous Rep. No. 92-433, at 22 (92nd Cong. 1st Sess. 1971).

A pattern of this sort runs through Headquarters' information practices generally. Cases and policy rulings favorable to System interests are disseminated promptly and interpreted broadly; those viewed as inimical to the smooth functioning of the System are formally publicized tardily or not at all. Thus, for example, in August, 1971, Headquarters decided to reverse a July 1 directive from the Director which had ordered boards to continue processing doctors for Special Call No. 46 although the Doctor's Draft Induction authority ceased at the end of June. This change in policy was never disseminated to the System. Only because it was discovered and reported in SSLR did some medical specialists learn of it, and then only those lucky enough to be in touch with a subscriber or reader of the Reporter. The same is true of a similarly-motivated Headquarters decision to cancel induction orders issued to doctors prior to July 1 and postponed beyond that date. Here again, relief was granted only on a "case-by-case basis" upon personal application to the General Counsel's office at Headquarters. A pre-publication requirement would prevent this sort of low-visibility decision-making.

On this date, the System issued Local Board Memorandum (LBM) 111, the text of which is set forth below.⁴

This directive is flawed in two respects. First, it is couched in the form of an LBM rather than an amendment to the Regulations. It is a good example of Headquarters' failure to restrict the subject-matter of LBM's to minor housekeeping functions. The significance of this for purposes of amended § 13(b) of the Act is discussed elsewhere in this statement.⁵ The use of this format also has an adverse impact on the System. The IBM format tends to signify to personnel that the message contained is of lesser authority than the Regulations themselves, and need not necessarily be followed.⁶

More importantly, LBM 111 thoroughly misconstrues the *Mulloy* decision. Although it properly quotes the Court's revision of R1625.2, this quotation is followed by the words:

"Particular attention must be given to insure that local boards observe the 'if true' qualification in acting either to reopen or deny a reopening of a classification."

This sentence suggests that boards are to reopen if they think the registrant's claim is true and to refuse reopening if they feel it is false. Such a suggestion totally misreads *Mulloy*. It calls for exactly the sort of evaluation which *Mulloy* prohibits until reopening (with appeal rights) has been granted. Said the Court:

"The Government suggests . . . that the Board may have concluded that the prima facie claim had been undercut by the petitioner himself—by his statements at the courtesy interview or because his demeanor convinced the Board that he was not telling the truth. . . . [I]t is precisely on such grounds as these that the Board action cannot be predicated without a reopening of the registrant's classification, and a consequent opportunity for administrative appeal." 3 SSLR 3013.

The proper interpretation of the words "if true" in R1625.2 is as follows: for purposes of deciding whether to reopen, the local board must treat *all* the registrant's claims as true. Their actual truth, as well as their validity under the standards governing the requested classification, will be tested only *after* reopening, at personal appearance and on appeal.⁷

⁴ Local Board Memorandum No. 111, issued: August 11, 1970. Subject: Reopening of registrant's classification.

1. In the exercise of your authority under Selective Service Regulations Section 1625.2 you will be guided by the following language of the United States Supreme Court in *Mulloy v. United States*, 38 LW 4509, 4510 (June 15, 1970):

"Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his [local] Board, and that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification, the Board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file."

The above quotation, it is believed, may be fairly interpreted as defining the kind of a case requiring reopening of a registrant's classification unless there is clear refutation contained in the file. Particular attention must be given to insure that local boards observe the "if true" qualification in acting either to reopen or deny a reopening of a classification.

2. It is to be emphasized that the above criteria are to be applied only where new claims are made by registrants prior to the issuance of the order for induction. Claims submitted by a registrant after the order for induction has been mailed to him, will still be processed under the clear provisions of Section 1625.2(b) of the regulations.

⁵ See Part III, *infra*. See also text at note 47, *infra*.

⁶ This is borne out by a report in the *Inspection Services Bulletin*, a monthly publication of Headquarters which summarizes the results of investigation of board performance by Operations personnel. The December 1971 issue, at page D-12, reports the results of inspections of 321 local boards in 28 states held in October and November, 1971. The reports states, "The response to LBM No. 116 and 121 has not been significant at the local board level." LBM 121 issued in June, 1971, established a comprehensive system of administrative review of results of pre-induction physical exams. It is reproduced in Appendix B.

See also note 64, *infra*.

⁷ Lower court decisions have consistently followed *Mulloy* in overturning improper refusals to reopen and "de facto" reopenings (evaluation of the merits of a claim in the guise of considering whether to reopen, followed by a refusal to reopen). E.g., *Ibn Wadud v. Laird*, 5 SSLR 3089 (D.N.J. 1971); *United States v. Butterfield*, 5 SSLR 3094 (D.Or. 1971); *United States v. Joyce*, 4 SSLR 3537 (D.S.D. 1971); *Rosely v. Commanding Officer*, 4 SSLR 3522 (E.D. Pa. 1971); *United States v. Molina*, 4 SSLR 3430 (D.N.Mex 1971); *Hall v. Richards*, 4 SSLR 3402, 447 F.2d 98 (9th Cir. 1971); *Grosfeld v. Morris*, 4 SSLR 3460, 448 F.2d 4004 (4th Cir. 1971); *United States ex rel. Sandhagen*

(Footnote continued on following page.)

When, on November 3, 1971, the Director, under his new authority, proposed major amendments to the Regulations, interested members of the public were surprised to note that R1625.2 was not amended, even belatedly, to conform to *Mulloy*. Many persons so informed Headquarters.⁸ As a result of the volume of comments, this provision was revised and repropose January 12, 1972. Incredibly, the newest proposal compounds the confusion apparent in LBM 111. The proposed Regulation now reads:

"The local board will reopen and consider anew the classification of a registrant . . . upon the written request of the registrant that is accompanied by written information presenting facts not considered when the registrant was classified or [sic]⁹ which in the opinion of the board, justify a change in the registrant's classification . . ." Proposed R1625.2 (Jan. 12, 1972). [Emphasis supplied].

Here, the words "if true," which, when correctly interpreted, limit the reopening decision to a preliminary screening of thoroughly frivolous claims, have been replaced by "in the opinion of the local board." This new language explicitly invites the board to make the kind of overall evaluation of the validity of a claim (truth of evidence and application of classification standards) which, to repeat, *Mulloy* specifically forbids.

Nor was the *Mulloy* decision based on the words "if true," so that it can be disregarded by removing those words from the Regulation. It is rather bottomed on the denial of procedural due process which occurs if a board denies a man's claim, in the guise of refusing to reopen, without permitting him a full hearing and an administrative appeal. See the language quoted at note 2, *supra*.

Mulloy has never been communicated to registrants in any informational brochure. The case was, however, accurately interpreted in a "Counselor's Manual" prepared for Headquarters by Ms. Betty Vetter, Executive Director of the Scientific Manpower Commission, with the help of this witness. Headquarters has now decided not to issue the "Manual" to draft counselors.

Welsh v. United States, 398 U.S. 333, 3 SSLR 3001 (1970), decided the same day as *Mulloy*, was treated by the System in a fashion quite similar to the latter case, except that here the delay in informing elements of the System was not serious. *Welsh* interpreted the statutory phrase "religious training and belief" broadly to permit registrants with moral and ethical, but not explicitly "religious," objections to war to qualify for conscientious objector (CO) status. The major problems with LBM 107 (July 6, 1970)—again an LBM was issued in lieu of an amendment to the Regulations—was its unwarranted interpretation of the *Welsh* decision. This matter was treated at length in an article by Dr. Bela Silard published in SSLR. A copy is reproduced in Appendix A to this statement.¹⁰

v. Eberhardt, 4 SSLR 3351 (N.D.Ga. 1971); *United States ex rel. Huisinga v. Commanding Officer*, 4SSLR 3317, 446 F.2d 124 (8th Cir. 1971); *United States v. Reeves*, 4 SSLR 3366 (M.D.Fla. 1971); *United States v. Bray*, 4 SSLR 3265 (9th Cir. 1971); *Barker v. Hershey*, 4 SSLR 3352 (W.D. Wis. 1971); *United States v. Krueger*, 4 SSLR 323 (N.D. Ill. 1971); *United States ex rel. Mulford v. Commanding Officer*, 4 SSLR 3150 (E.D. N.Y. 1971); *United States v. Brady*, 4 SSLR 3126 (D. Mass. 1971); *United States v. Ball*, 4 SSLR 3044, F.2d (7th Cir. 1971); *Fallon v. Local Board No. 11*, 4 SSLR 2042 (W.D.Wis. 1971). These decisions were published in SSLR during the eight month period from April to December, 1971.

The most significant application of *Mulloy* has been to medical claims, since more registrants qualify for medical disqualification than for any other deferment or exemption. More than 50% of all registrants are found medically unfit, while around only 1% even file C.O. claims. System elements have consistently followed the practice of forwarding all medical claims to Armed Forces Entrance and Examining Stations (AFES) for disposition, although local boards and their medical advisors have the power under the Regulations (Part 1628) to pass on these cases. The Courts of Appeals for the First and Ninth Circuits, whose decisions are binding in New England and California (the state with the most pending draft cases) have recently ruled that this practice violates *Mulloy*. *United States v. Ford*, 3 SSLR 3442, 431 F.2d 1310 (1st Cir. 1970); *United States v. Miller*, 5 SSLR 3174 (9th Cir. 1972). See also, e.g., *United States v. Butterfield*, 5 SSLR 3094 (D. Ore. 1971).

⁸ SSLR maintains a public file of copies of comments submitted to Headquarters on regulatory amendments proposed under § 13(b) of the Act. These are available for inspection by the Subcommittee if desired.

⁹ If this "or" is not a typographical error, then there is no problem with the new regulation. The "or" seems to make no sense in context, however, consequently, it will be ignored in the discussion which follows.

¹⁰ Predictably, courts have begun to invalidate local board denials of CO claims based on the unauthorized criteria established by LBM 107. See, e.g., *United States ex rel. Flegel v. La Franc*, 5 SSLR 3075, (N.D. Ohio 1972); *cf. Kern v. Laird*, 4 SSLR 3776 (D. Colo. 1971); *Moore v. Dalessio*, 5 SSLR 3068, 302 F.Supp. 926 (D. Mass. 1971).

Registrants were informed of *Welsh* in the System's brochure, "CO," but Form 150, Special Form for Conscientious Objectors, has *not* yet been amended to take the decision into account, although nearly two years have elapsed since it was issued.¹¹

2. Orders in Class Actions

Perhaps most blatant of all cases of administrative disregard of relevant judicial decisions is the System's tendency to ignore orders in class actions to which the Director and/or other System officials are parties. The major example of this involves the case of *Gregory v. Hershey*, 2 SSLR 3524, 311 F. Supp. 1 (E.D. Mich. 1969).¹² The judgment in *Gregory*, 2 SSLR 3604, 51 F.R.D. 188 (E.D. Mich. Feb. 1970), ordered the Selective Service System to reclassify into Class III-A *all* registrants who demonstrated that they have a child or children with whom they maintain a bona fide family relationship in their homes . . . are not physicians, dentists or veterinarians or in an allied specialist category . . . , and . . . have not received an undergraduate II-S deferment under Section 6 (h)(1) of the Military Selective Service Act of 1967 . . . , but . . . have received a graduate II-S deferment under Section 6(h)(2) of that Act.

The System apparently took no steps to heed this order, arguably thereby putting itself in contempt of court. Not surprisingly, registrants who established that they were members of the class were able to have their inductions barred on the basis of *Gregory*.¹³ When *Gregory* was later overturned by the Court of Appeals for the Sixth Circuit,¹⁴ the Government moved to dissolve the orders in these later cases.¹⁵

The motions failed, since the ultimate fate of *Gregory* did not excuse the Systems failure to abide by it while it was law. Said Judge Urbom in *Whitmore*, quoting *Schrader* in part:

Plaintiff contends that when the National Director took no action to comply with this order of the District Court [in *Gregory*], he acted lawlessly . . . I agree.

If the National Director disagreed with the position of the District Court in *Gregory*, his sole remedy lay in the Sixth Circuit Court of Appeals. Until the judgment of the District Court was reversed, the National Director was bound by it and by its direct order to reclassify to class III-A anyone who made a showing that he was a member of the *Gregory* class. To totally ignore this order while it was in effect constituted lawlessness.

A fundamental concept recognized consistently by the Supreme Court . . . is that judicial orders shall not be disobeyed, "no matter how well-founded their doubts might be as to their validity." [Citations omitted.] The Rule of Law dictates that the orderly processes of the judicial system must be preserved against acts . . . which lessen the efficacy of the courts . . .

That the ignoring or violating of a judicial order is by a member of the

¹¹ Three years went by before former Director General Hershey modified Form 150 to take into account *Seeger v. United States*, 380 U.S. 163 (1965). A new form 150 was finally proposed January 12, 1972. It is not yet in effect. Once again, judicial invalidations of induction orders based on the misleading language of Form 150 are beginning to appear. E.g., *United States v. Van Cleve*, 4 SSLR 3494 (D. Minn. 1971). Cf. *United States v. Taylor*, 4 SSLR 3552, 448 F.2d 349 (5th Cir. 1971) (en banc decision affirming ruling that petitioner acted "unreasonably" in failing to press CO claim because of Form 150's misleading language; three judges dissented). Similar consequences followed the long delay in revising Form 150 to reflect *Seeger*. E.g., *United States v. Buckles*, 3 SSLR 3883 (N.D. Cal. 1971).

¹² *Gregory* was reversed a year after *sub. nom. Gregory v. Tarr*, 3 SSLR 3682, 436 F.2d 513 (6th Cir. Jan. 1971), but as the discussion in text will show, this did not validate local board action taken between February 1970 and January 1971 in violation of the district court's order.

¹³ *Schrader v. Local Bd. No. 76*, 4 SSLR 3694 (W.D. Wis. 1971); *Whitmore v. Tarr*, 2 SSLR 3734, 318 F. Supp. 279 (D. Neb. 1970). These cases granted relief prior to induction, under the narrow judicial exception the Supreme Court has carved out of the bar to preinduction judicial review in § 10(b) (3) of the Act. This exception is allowed only where an element of the System acts in a "blatantly lawless" manner. See *Oesterreich v. Local Bd. No. 11*, 393 U.S. 233, 1 SSLR 3215 (1968). (In the period April-December 1971, SSLR published about 400 draft cases. About 50 of these sought preinduction review; it was granted in 17. Citations are available on request.)

¹⁴ See note 12, *supra*.

¹⁵ *Schrader v. Local Bd. No. 76*, *supra*; *Whitmore v. Tarr*, 4 SSLR 3796 (D. Neb. 1971).

executive branch of government does not alter the necessary rule. . . . The only protection the judicial branch has against impingement upon its authority by the executive branch, *other than the traditional contempt power*, is to refuse enforcement in the courts of official actions taken in contravention of judicial power. . . .

Accordingly, I hold that the order of the local board . . . was void when issued. . . . [Emphasis supplied.] 4 SSLR at 3795.

3. Court of Appeals Decisions

Headquarters has paid even less attention to Courts of Appeals rulings than to those of the Supreme Court, as was already noted in the discussion of *Mulloy, supra*.¹⁶ This is understandable where only one or two of the eleven Courts of Appeals have adopted a particular position, although even in such cases compliance with minority rules is indicated within the multi-state judicial circuits involved. But where all or nearly all have taken the same position, the System ignores such widespread authority at the risk of numerous needless prosecutions and other litigation, attended, as indicated, by both inefficiency and unfairness. Such has been the experience, for example, under the judicial requirement, now adopted in substantial form by *ten* circuits,¹⁷ that draft boards state reasons for denying *prima facie* deferment claims.¹⁸ A quick count of the decisions published in SSLR between May 1971 and January 1972 discloses some 30 cases in which defendants were acquitted or their conviction reversed because their board failed to state reasons for denying *prima facie* CO claims.¹⁹ The time spent by registrants, government attorneys and the courts on these cases was all wasted; defendants were exposed to the anxiety of prosecution and the uncertainty of a criminal defense to vindicate their position. How many others entered the service either in fear of losing the gamble of prosecution or in ignorance of the errors made by their boards? Assistant Attorney General Robert Mardian, responsible for prosecution of all Selective service violations, stated in his February 23, 1972, letter to Senator Kennedy, that 80 percent of all registrants who refuse induction eventually agree to submit. Pressure from F.B.I. agents and U.S. Attorneys undoubtedly plays a large role in such decisions. Certainly no registrant has received word from the System that boards were required to tell them why their CO claims had been turned down over the last two years.

Many as-yet-unindicted cases must be infected with this flaw. In fact, Headquarters has belatedly begun to issue directives providing for review of files for errors of this sort.²⁰ This system of review, lodged primarily with

¹⁶ See note 2, *supra*.

¹⁷ See *United States v. Edwards*, 4 SSLR 3583, 450 F.2d 49 (1st Cir. 1971); *United States v. Lenhard*, 3 SSLR 3532, 437 F.2d 936 (2d Cir. 1970); *Scott v. Commanding Officer*, 3 SSLR 3277, 431 F.2d 1132 (3rd Cir. 1970); *United States v. Broyles*, 2 SSLR 3562, 423 F.2d 1299, 1305-06 (4th Cir. 1970); *United States v. Stetter*, 4 SSLR 3199, 445 F.2d (5th Cir. June 1971); *United States v. Washington*, 1 SSLR 3008, 392 F.2d 37 (6th Cir. 1968); *United States v. Lemmens*, 3 SSLR 3185, 430 F.2d 619 (7th Cir. 1970); *Caverly v. United States*, 3 SSLR 3194, 429 F.2d 92 (8th Cir. 1970); *United States v. Haughton*, 2 SSLR 3173, 413 F.2d 736 (9th Cir. 1968); *United States v. Andrews*, 4 SSLR 3345, 446 F.2d 1086 (10th Cir. July 1971). *Contra*: *Gruca v. Sec'y of the Army*, 3 SSLR 3372, 436 F.2d 239 (D.C. Cir. 1970). It has already been noted that almost no draft cases arise in the District of Columbia because no AFEEs is located there. Thus, judicial statement-of-reasons rules were in effect in nearly all 50 states by the time Congress added a similar legislative requirement in Public Law 92-129. In addition, in June 1971, the Supreme Court decided *Clay v. United States*, 403 U.S. 698, 4 SSLR 3258, in which the famous boxer's conviction was overturned in part because the appeal board failed to state reasons for denying his CO claim.

¹⁸ The exact scope of these judicial rules is prospectively immaterial in light of the 1971 amendments to the Act, requiring statements of reasons on request in all cases, and the System's praiseworthy decision to provide such reasons automatically. Retrospective application is, however, of importance. At least one Circuit has held its statement of reasons rule to have fully retroactive effect. *United States v. Crownfield*, 3 SSLR 3833, 439 F.2d 839 (3d Cir. March 1971).

¹⁹ Full citations of these cases are available on request.

²⁰ Memorandum to All State Directors GC-1 (Mar. 31, 1971), revised and expanded in MASD GC-7 (July 26, 1971). MASD GC-1 lacks specific instructions and may not have been used by local boards. GC-7, however, was reproduced for local board use. Note that neither was issued for the purpose of alerting board members to the requirements for processing *current* cases.

System Regionals Counsel, is only now (February 1972) approaching full operation.²¹

4. Improper Responses to Judicial Requirements

Some local boards personnel seem to believe that this problem can be corrected simply by placing statements of reasons in files at this time, irrespective of the appeals status of the registrants involved. Four examples of improper inclusions in files have come to my attention in the last month.

A very recent district court decision in a CO case discloses several instances of tampering with a registrant's file. Judge McLean, in *US. v. Sobieralski*, 5 SSLR 3175 (S.D.N.Y. 1972), acquitted a defendant for lack of basis in fact and his board's failure to state reasons for denial of his claim. The judge found:

"What happened here is that the board didn't give any reason for its decision and belatedly, long after the event, tried to straighten out the record by putting more papers in the file."

Specifically, he detected two "forgeries." First, the summary of the registrant's personal appearance, held in July 1970, contained the notation "Reviewed under new guidelines and the Board feels the registrant is not sincere." Of this the judge said:

"I am inclined to think that that phrase was filled out later and was not filled out that way when this form was submitted to the appeal board in September [1970], because I notice that pages two and three and four of the form each bear the appeal board's stamp dated September 1; but the first page, where this rather inadequate reason is given, does not bear that stamp."

The second questionable document was a "Report of Information" (SS Form 119) dated July 28, 1970. This also lacked the Appeal Board stamp and was not noted in the local board "Minutes of Action" on the back of the registrant's classification questionnaire, where such documents should be entered. There was an entry dated "July 28" on the classification questionnaire: it read "Registrant not sincere" and it appeared to Judge McLean "to have been filled in at a different time."

Finally, after the registrant had refused induction on December 15—some 6 months after his appeal—another Report of Information was put in his file setting forth a somewhat more coherent, if legally inadequate statement of reasons for the decision:

"The board sustained the original decision to deny a CO classification for the following reason: the registrant did not sign series 8 of SS100 when he registered. He accepted a 2-S classification for almost six years. He attempted to receive a deferment for occupation and when that failed, he claimed CO status as a last resort in trying to avoid the draft. Therefore, the board feels his request for a CO was a matter of expediency. . . ."

No attempt was apparently made to "predate" this document.

The first two interpolated documents are particularly objectionable, since they were designed to give the (false) impression that they had been placed in the file in a timely manner. Making fictitious entries in files is a felony under Section 12 of the Act, in fact. The only way a registrant can protect against this sort of fraud—if he is lucky enough to be aware of the need for protection—is to examine and copy all documents in his file at frequent intervals. Such a course is manifestly oppressive since many registrants live far from their local board. Boards should be required to inform registrants promptly of every notation and document placed in their file, not just of reasons for decision.²²

²¹ Interview with Walter Morse, Esquire, General Counsel of Selective Service, January 1972. And the adequacy of this effort is doubtful. As of December 1971, only twelve (12) Regional Counsel were on the job; they were responsible for review of some 20,000 reported violations nationwide. *Id.* For example, Messrs. Willard Silverberg and Paul Ostien were responsible for all cases in Connecticut, Delaware, D.C., Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York City, New York State, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, Virgin Islands, and West Virginia. *Id.* Mr. Morse concluded that few cases are as yet actually reviewed by Regional Counsel. *Id.*

²² A judicial requirement already exists that boards inform registrants of adverse matter included in their files. See note 23, *infra*. Because it is difficult to determine what might be considered adverse, the System should adopt a broad rule requiring notification of *all* submissions. R 1622.1(c) directs boards to receive and consider all pertinent information presented to it. The potential oppressiveness of this problem is illustrated in an exchange of correspondence between Senator Hartke and Dr. Tarr in which the Director rejected the Senator's suggestion that registrants be informed of such submissions. See Appendix C.

The third document at least was apparently not inaccurately dated, but it still is a falsification of the files, since it hardly can be an accurate statement of the reasons for the board's decision six months earlier. Its tardy inclusion in the file meant the defendant had no opportunity for a hearing or administrative appeal during which to meet the new reasons. Since the file cannot be supplemented at trial, such a procedure violates due process in much the same manner as an arbitrary denial of reopening. See *Mulloy, supra*.²³

A similar fraud was practiced in a recent case in Maine, *United States v. Proulx*, Cr. No. 5352, according to a memorandum filed by the U.S. Attorney on March 1, 1972. Here the goal was apparently to give a semblance of compliance with the *Ford decision*, discussed above in note 7. Proulx' file contains a medical letter dated Nov. 3, 1970. Typed across the top is the entry "Reviewed by local board 11/4/70 recommend evaluation by AFES [sic] (Armed Forces Examining Center)." In fact, the board did not even receive a copy of this letter until after Proulx' preinduction examination on Nov. 5, 1970. A copy of this letter is in Appendix D.

A New York attorney has just sent me correspondence about another young man whose board placed "improved" statements of reasons in his files more than 1 year after originally denying his claim.

The fourth case involves a registrant who photocopied his file on November 26, 1971. The "minutes of action" then contained entries showing mailing of a notice of classification (Form 110) on December 15, 1971—almost a month later. The date of mailing his Form determines the cut-off point for appeal rights. Frauds here are fraught with unfairness.

In MASD GD-7, State Directors were instructed to reproduce the checklist for use by local boards in reviewing individual registrants' cover sheets prior to forwarding them to the United States Attorney for prosecution.

This language invites improper board action. It does not state that boards are to review files in order to decide *whether* to forward cases for prosecution, but rather to review them "prior to forwarding them," an apparently ministerial act. What can this sort of review accomplish except to permit tampering with documents in the file? The checklist facilitates this for it conveniently indicates which features of the file indicate "possible error in government's case." To complete the picture, MASD GC-7 states that the checklist should be forwarded with the file to the United States Attorney for information and use, *but shall not become a part of the registrant's cover sheet*. [Emphasis supplied.]

Copies of these Memos and the *Sobierski* case are included in Appendix D.

In this section I have investigated the System's failure to take prompt and adequate account of binding court decisions. I must also mention one sort of prompt and effective, yet questionable, response the System occasionally has made under the current Director. This is simply to change or remove the regulatory language upon which courts have based their decisions. As previously noted, the recent proposed revision of R16252 may have been designed to avoid the impact of *Mulloy*, by deleting the words "if true."^{23a}

More importantly, in one two-and-one-half week period in late 1970 (August 26 to September 9), Headquarters (1) abolished the requirement that local board members reside in the area served by their board;²⁴ (2) made the medical interview a matter of discretion rather than right;²⁵ and (3) abolished "pre-classification" interviews in CO cases.²⁶

²³ See *United States v. Speicher*, 3SSLR 3850, 439 F. 2d 104 (3d Cir. March 1971); *United States v. Calderaro*, 3 SSLR 3827 (D. Ore. 1971). Alternatively, this and the other interpolations may be viewed as adverse submissions to the registrant's file. Under settled principles, failure to notify men of such inclusions in their files is a denial of due process. *Gonzales v. United States*, 348 U.S. 407, 415 (1955); e.g., *United States v. Abbott*, 2 SSLR 3561, 425 F.2d 910, 913n (8th Cir. 1970); *United States v. Cummins*, 2 SSLR 3655, 425 F.2d 646, 649 (8th Cir. 1970).

^{23a} See text between notes 9 and 10, *supra*.

²⁴ Executive Order (E.O.) 11555 (Sept. 2, 1970), amending R1604.52 (c). A court had just ruled that violation of this residency requirement invalidated induction orders. *United States v. Cabbage*, 3 SSLR 3179, 430 F.2d 1037 (6th Cir. July 1970). The rule was designed, of course, to insure that boards were made up of "little groups of neighbors," or originally intended.

²⁵ E.O. 11553 (Aug. 26, 1970), amending R1628.2. A court had just announced itself ready to enforce this right. *United States v. Ehret*, 3 SSLR 3176, 431 F.2d 1146 (9th Cir. August 1970) (dictum).

²⁶ Local Board Memorandum (LBM) No. 41, which provided for these, was rescinded August 27, 1970. A court had just held mandatory this provision *United States v. Davila*, 3 SSLR 3089, 429 F.2d 481 (5th Cir. July 1970). This interview had supplanted a Department of Justice investigation of CO claimants relied on by boards prior to the 1967 amendments to the Act. Boards need ample opportunity for personal scrutiny of CO claimants in order to evaluate their sincerity.

This sort of response to court decisions does not appear to reflect the balanced judgment which should guide decisions to change the rights accorded by the Regulations. At all event, it should scotch any suggestion that Headquarters' failure to amend the Regulations to conform to decisions such as *Mulloy* could be blamed on the difficulty of issuing amendments by Presidential Executive Orders, and then required.^{26a}

5. The Significance of this Problem

Mr. Chairman, you may wonder why I have examined this problem in such detail. After all, it is commonplace for administrative agencies to ignore, interpret narrowly or even occasionally announce "nonacquiescence" in judicial decisions, particularly those of the lower courts. The practices of the Internal Revenue Service come immediately to mind.

In the first place, it is highly doubtful that other agencies have treated Supreme Court decisions as lightly as the System did *Mulloy*. But more importantly and more generally, judicial review of administrative processing and decision-making by the System is radically more restricted than of other agencies' actions. Preinduction review is barred in almost all cases by § 10(b) (3) of the Act. As a result registrants must either violate the Act and undergo felony prosecution, or actually submit to induction, before courts will inquire into the legality of their processing. This is so although board error are by no means uncommon, as pointed out earlier,²⁷ and the System's orders deprive young men of liberty and may even threaten life.

Furthermore, a judicial doctrine requiring exhaustion of administrative remedies will bar review altogether (even in criminal cases) where registrants have failed to take administrative appeals from adverse local board decisions. The exhaustion bar is applied although such appeals are by no means required (in fact, the case can be made that the System discourages appeals, e.g., by severely curtailing the time given to registrants to claim them), and the System does not inform registrants of these consequences of failure to appeal.^{27a}

Finally, as mentioned earlier, discrepancies between directives and court decisions are a prime example of the sort of problem the prepublication requirement was designed to deal with. See Part III, *infra*.

C. Other Qualitative Problems with Official Directives

1. Lack of Legal Craftmanship

Mr. Chairman, as a lawyer I am frequently dismayed at the extent to which formal Headquarters regulatory directives must be considered flawed according to the standards of legal craftsmanship. Three types of draftsman-ship problems are prevalent: (a) excessive ambiguity, obscurity and complexity of phrasing; (b) serious gaps in treatment of particular topics and other negligent errors; (c) inconsistencies and conflicts within and between classes of directives, and between the Act and regulatory materials: In impact, these kinds of errors resemble those already discussed: both administrative and judicial inefficiency and gross unfairness to registrants flow from them. And, to repeat, such flaws could be detected and corrected if these directives were republished.

(a) A prime example of both ambiguity and obscurity may be found in R1631.6 (formerly 1631.7) and LBM 99, the regulations which establish and regulate the "random selection" system.²⁸ Confusion here is particularly unfortunate since one of the President's major justifications to Congress for

^{26a} See text at note 58a, *infra*.

²⁷ See note 1, *supra*.

^{27a} This matter is discussed in more detail below. See text at note 57, *infra*.

²⁸ In 1969 Congress authorized the President to establish such a system for determining which young men will be inducted, since the Army needs only a fraction of the available manpower pool. P.L. 91-124 (Nov. 26, 1969). Congress did not, however, dictate the form the lottery system was to take. Consequently current R1631.6 was promulgated to define the current system, in effect functioning as its "statutory" basis. LBM 99, which implements R1631.6, functions as a Regulation. The current text of both regulations is in Appendix E.

seeking authority to institute random selection was that it would enable young men to know their draft liability with some certainty.²⁹

The major ambiguity in these regulations lies in a proviso setting forth the circumstances under which registrants continue to be liable for induction beyond the normal cut-off point.³⁰ It reads:

[M]embers of the Extended Priority Selection Group who would have been ordered to report for induction to fill the last call in the first quarter of the calendar year *but who could not be issued orders shall remain in the Extended Priority Selection Group and shall be ordered to report for induction as soon as practicable. Circumstances which would prevent such an order shall include but not be limited to those arising from a personal appearance appeal, pre-induction physical examination, judicial proceeding, or inability of the local board to act.* R1631.6(d) (5) *proviso*. [Emphasis supplied.]

The obvious question is what the phrase "inability of the local board to act" means since the enumeration of events preventing induction is not exclusive and no *ejusdem generis* rule³¹ can be extracted from it to guide interpretation of this more general phrase. Most of the specifically enumerated items are delays instituted by or at the instance of the registrant, but not all (e.g., preinduction examination).³²

Not surprisingly, this problem has already stirred up a significant amount of litigation.³³

The decisions predictably go in all directions, and one court has questioned the propriety of basing a felony prosecution on such an ambiguous regulation.³⁴ In *United States v. Born*,³⁵ the most recent decision, Chief Judge Fox granted defendant's motion to dismiss his indictment for failure to report for induction on June 21, 1971. Born had been originally ordered in January 1971, but the State Director subsequently ordered his board to reopen his case because it had committed procedural error. The judge concluded that this kind of delay was not within the sense of the phrase "inability of the local board to act." Said he,

The language to be construed is anything but precise . . . In *Smith v. Tarr*

²⁹ See the President's Congressional message recommending creation of a lottery system, reprinted with comments in Hearings on Bills to Amend the . . . Act . . . to Authorize Modifications of the System of Selecting Persons for Inductions . . . Before the Special Subcommittee on the Draft of the House Armed Services Comm. 4486-87 (91st Cong. 1st Sess. 1969) (H.A.S.C. No. 91-19):

2. Reduce the period of prime draft vulnerability—and the uncertainty that accompanies it—from seven years to one year, so that a young man would normally enter that status during the time he was nineteen years old and leave it during the time he was twenty.

³⁰ This cut-off point is normally April 1 of the year *after* the year of prime exposure for men whose lottery numbers had been "reached" but who were not yet inducted. Under the new "national" call, this group promises to number in the hundred of thousands. EPS Group B has 115,000 members according to SSS News Release No. 72-3 (Feb. 8, 1972).

³¹ A rule of statutory construction to the effect that general words following an enumeration of specific things are usually restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated. 1 *Bouvier's Law Dictionary* 979 (8th rev. by F. Rawle 1914).

³² Perhaps in recognition of the problems with this provision, LBM 99 was amended Nov. 10, 1971, to limit overall liability under this provision to 270 days of continuous "availability." A registrant is "available" when not deferred or involved in personal appearance or appeal and when his preinduction examination is completed. Even with this "limitation" this extension of liability arguably violates the President's originally expressed intention to give all registrants a brief, clear-cut period of liability under the lottery system. See note 29, *supra*.

³³ Two Court of Appeals decisions on particular points have already been rendered. *Smith v. Tarr*, 4 SSLR 3280, 444 F. 2d 251 (2d Cir. 1971); *Lawton v. Tarr*, 4 SSLR 3374, 446 F.2d 787 (4th Cir. 1971). See also *Schemanski v. Tarr*, 4 SSLR 3618 (N.D. Ill. 1971).

³⁴ Under the Due Process clause of the Fifth and Fourteenth Amendments, overly vague criminal statutes are invalid because they do not give sufficient notice of the scope of proscribed conduct. The classic case is *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Somewhat similar standards should be applied to Selective Service regulatory provisions governing issuance and validity of induction orders.

Of course, judicial review is also available through habeas corpus after induction, at least for men who are not CO's. But a majority of cases of erroneous classification/processing probably involve CO's. More significantly, submission to induction imposes burdens not dissimilar from criminal incarceration—which explains why the habeas remedy is available to test the legality of military custody.

³⁵ 5 SSLR 3185 (W.D. Mich. Feb. 18, 1972).

... the court construed the language ... "not a model of clarity" ... Here, substantial delay beyond the regulation deadline was prompted ... by concededly irregular, unjustifiable and lawless conduct on the part of the local board. Is the regulation presently before the court to be construed to place the burden of criminal sanctions upon the registrant in such circumstances? This court thinks not. 5 SSIR at 3186.

R1631.6 and LBM 99 also exemplify the obscurity characteristic of some regulatory material. As the reader will have noted from the previous example, the lottery system is hardly a model of simplicity and clarity. For example, registrants may be placed in the "First," "Second" or "Third Priority Selection Groups" (next year, the "Fourth," the following the "Fifth," and so on, until age 26), or no group (if deferred), or the "Extended Priority Selection Group, Subgroup A" (if available and in the First Priority Group on December 31, 1970, with a "random sequence" (lottery) number from 1 to the top number, not exceeding 195, "reached" by their own local board during 1970) or "Subgroup B" (if available and in the First Priority Group on December 31, 1971, with a lottery number from 1 to 125, irrespective of the top number actually reached by their own boards in 1971):³⁶ a First Priority Group registrant's number is "reached" if the board called young men with lottery numbers equal to or higher (numerically larger) than his from the First Priority Group sometime during the year, whether or not he was then available or even in the First Priority Group at all at the time. So it goes.

The lottery system is in fact so complex that not only registrants but even Headquarters and local boards make mistakes trying to follow it. For example, LBM 99 itself states that men who are not inducted from and thus (eventually) leave the Extended Priority Group (Subgroup A or B) are to be placed in the Second Priority Group, Para. III.F. This is wrong. R1631.6 provides in pertinent part

Members of the Extended Priority Selection Group who have not been issued orders to report for induction ... shall forthwith be assigned to the lower priority selection group to which they would have been assigned had they never been assigned to the Extended Priority Selection Group ... R1631.6(d) (5)

Applying this language to the definitions of Subgroups A and B above, it can (with some difficulty) be demonstrated that men who leave Subgroup A this year should be transferred to the current Third Priority Selection Group. No registrant in the Third Priority Group can be inducted until all 400,000-odd members of the Second Priority Group are called, a fact which is currently of little importance but could make a big difference in future years.³⁷

Draft attorneys consistently report local board errors in priority group placement. In fact, it is common for counselors to advise registrants to inspect their files after year's end to determine what priority group their board has placed them in.

Perhaps the most obscure of all Regulations is the proviso in proposed R1625.2, another part of which was discussed above in connection with *Mulloy*. According to Headquarters,³⁸ this proviso, set forth in full below, authorizes registrants whose outstanding induction orders have been postponed to have their classifications reopened under the standards applicable to claims filed before issuance of induction orders, rather than under the more severe standard

³⁶ Or, next year, Subgroup C. ... The Director is reportedly currently considering reuniting the elements of the Extended Priority Selection Group, which was alphabetically subdivided by the November 1971 amendments to LBM 99. This amendment is arguably unauthorized, since R1631.6 makes no provision for significant extensions of draft liability.

³⁷ Other Headquarters' misreadings of R1631.6 may be found in example 4 of LBM 99 and a sample letter to members of Extended Priority Group B attached to Letter to All State Directors 00-50 (Dec. 14, 1971).

³⁸ SSS Press release No. 72-1 (Jan. 12, 1972). It summarizes the effect of the proviso even more simply than the discussion below:

A registrant who receives a postponement of induction authorized by a state director or the National Director, or issued in order for the registrant to complete a school term or academic year, will be able to receive consideration for a classification change until 30/40 days prior to his actual induction date.

generally applied to post-induction order claims (i.e., no reopening unless the registrant can demonstrate "a change of status due to circumstances beyond his control"). This less stringent standard will be applied only to postponements by the National Director or a State Director or under the sections of the Act which require postponements to permit high school or college students to complete a school term, and only until 30-40 days before the date finally scheduled for induction. The proviso follows:

Provided, that in the event of paragraph (d) or (e) of this section [reopening by local board on request of registrant or motion of board] the classification of a registrant shall not be reopened after the local board has mailed to such a registrant an order for induction or alternate service or, in the event the order to report for induction or alternate service was postponed and a subsequent letter from the local board established the date for induction or for reporting for alternate service, unless the local board first finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.³⁹

Alan Dranitzke, who proceeded me as editor of the *Selective Service Law Reporter* and is now an attorney here, found the above proviso so confusing that he could not make use of it in appellate argument in a draft case of his. He despaired of being able to convince the Court of Appeals that it means what the press release says.⁴⁰

Nor is the new Registrants Processing Manual, designed to be simple enough for laymen, without its obscure points. For example, it lacks specific cross references, simply directing that so-and-so processing point be handled according to "current directives." At this time of flux not even this witness is sure what directives are current.⁴¹

(b) Many recent regulatory issuances seem to reflect hasty and incomplete preparation. Often there will be serious gaps in coverage, necessitating revisions and promulgation of explanatory directives. For example, original R1631.6 and LBM 99 did not provide for periods of "zero" draft calls, such as most of the last nine months. As a result, Headquarters has had to devise ad hoc procedures for juggling the 11,000 men not yet inducted from last year's Extended Priority Group (A) and all 115,000 men in this year's Group

³⁹ Actually to be complete, this proviso must be read in conjunction with proposed R1632.2, *Postponement of Induction*, although no cross-reference is given in either provision to suggest this. The latter provision provides (b) The Director of Selective Service or any State Director . . . may at any time after the issuance of an Order to Report for Induction . . . postpone the induction of a registrant until such time as he may deem advisable. (c) The local board shall postpone the induction of a registrant in accordance with section 6 (1) (1) or section 6 (1) (2) of the Military Selective Service Act [these mandate postponements to end of term (or year, for seniors) for college and high school students]. (e) A postponement authorized in paragraph (b) or (c) of this section in excess of 40 days or without limit may be terminated when the issuing authority so directs and upon not less than 30 days nor more than 40 days notice to the registrant. The registrant shall then report for induction at such time and place as may be fixed by the local board.

Alert readers may have noted the inconsistency between subsections (c) and (e) of this provision. Sections 6(1) (1) and 6(1) (2) of the Act *require* postponements to end of term; subsec. (e) purports to authorize the local board to terminate such postponements "when [it] so directs."

⁴⁰ Discrepancies between press release summaries of recent amendments to the Regulations and the Regulations themselves have occurred more than once. The most blatant example occurred in connection with the major changes proposed November 3, 1971. These included a proposal which would have barred many registrants from appealing to the appeal board after their local board personal appearance unless they had requested such an appeal before even meeting with the local board. Proposed R1624.5 (Nov. 3, 1971). This major change in appeal rights was nowhere mentioned in SSS Press Release No. 71-17 (Nov. 2, 1971), which otherwise gave a detailed summary of the major changes proposed. The Director of Selective Service later acknowledged that he had personally rejected a proposal by the Operations Division to curtail appeals in the manner of proposed R1624.5. It thus appears that the Public Information Offices press release more accurately conveyed the Director's intent than the formal Regulations themselves! The November proposal was eliminated in the proposals of Jan. 12, 1972.

⁴¹ Ad. Bull. No. 765.1, Part I (Jan. 1, 1972) lists the "official issuances" of Headquarters. These include five manuals, three bulletins, Letters to All State Directors, and six other minor issuances. Local Board Memorandums are *not* included, but "all discontinued issuances will remain valid until rescinded or superseded." Ad. Bull. 765.1 is reproduced in Appendix F.

(B). LBM 99 had to be amended to create these subgroups and establish a 270 day outer limit for induction from the EPSG. Then Letters to All State Directors OO-51 and OO-53, and a "personal" letter to the state directors, were issued. These established the fiction that *all* Group A members have been "available" since July 1, 1971 (irrespective of their actual status) so that their 270 days are up on March 26, 1972. R1631.6 and LBM 99 provided no other escape-hatch, although the 11,000 remaining members of Subgroup A have now been in the prime liability group for 27 months, due to delays which for the most part were not their fault.

LASD 00-51 itself has been revised and reissued twice since December 1971, once because of complaints of fairness in handling 1-0 registrants during this period of no inductions, once to add a paragraph to cover a major class of cases simply omitted from the prior version.⁴² More changes may be forthcoming as a result of litigation recently filed here in the District of Columbia.

R1631.6 as originally drafted failed to include 1-0 registrants at all in its definitions of the various priority groups. Piecemeal amendments have inserted "1-0" in most of the more than eight places required. But see the language set forth below in the textual comparison with LBM 99. The LBM refers to both induction and civilian work orders; R1631.6 solely to induction orders.

A final example of sloppy draftsmanship is the extraneous "or" in proposed R1625.2 noted above in the discussion of *Mulloy*.^{42a} As indicated there, the phrase is almost unintelligible unless this word is ignored, yet the error was not caught. Ironically, it appears that a similarly located "or" in the very next sentence of proposed R1625.2 *was* detected and removed before the proposed text was sent to the Federal Register for publication.⁴³

(c) Many of the draftsmanship problems discussed in the last two sections also involve conflicts between various classes of directives. For example, LBM 99 conflicts with R1631.6 over the proper placement of men leaving EPS Group A.⁴⁴ Another serious conflict between R1631.6 and LBM is set forth below:

LBM 99

E. Transfer from First Priority Selection Group to Extended Priority Selection Group

(1) Any registrant in the First Priority Selection Group on December 31 . . . who was not *issued an [induction order or civilian work order] with a scheduled reporting date within that calendar year*, shall on January 1 of the following year, be assigned to the Extended Priority Selection Group. [Emphasis supplied.]

R1631.6

(d) (4) Members of the First Priority Selection Group on December 31 . . . who had not been *issued Orders to Report for Induction during the calendar year* shall be assigned to the Extended Priority Selection Group . . . [Emphasis supplied.]

Since induction orders at year's end are issued in late November for January induction, LBM 99's added language is of some importance. Note, also, that R1631.6 nowhere mentions alternate service orders. To this extent LBM 99's attempt to fill the gap is unauthorized, as is its subdivision of the Extended Priority Group into "A," "G," etc.

There are also conflicts between the Registrants Processing Manual (RPM) and the Regulations. For example, proposed R1621.10(a) (Jan. 12, 1972)

⁴² Copies of these directives are included in Appendix G. Headquarters was not willing to take the position that "inability of the local board to act" (See text at note 31, *supra*) does not include situations where there are no inductions due either to lapse of induction authority (as occurred last summer) or to zero-draft-calls (as during the first quarter of this calendar year).

^{42a} See note 9, *supra*.

⁴³ The typed version of this latter sentence contains an extra space in the place where this "or" was removed. Copy available on request.

⁴⁴ See text at note 37, *supra*.

gives registrants ten days to return their Registration Questionnaires (Form 100). This is an important right since some terms on Form 100 are both significant and obscure. RPM Ch. 613, however, clearly contemplates that Registration Questionnaires will be filled out in the presence of registrars. Local boards in at least two states (Illinois and Maryland) so interpret it, the former because of a state headquarters memorandum so directing.

2. Directives Beyond the Authority of the Act and Regulations

An extremely serious problem of authorization exists for a substantial number of LBM's and other directives issued by the Director between 1969 and 1971. In testimony before the Administrative Practice and Procedures Subcommittee on February 28, 1972, Dr. Tarr acknowledged that prior to October 12, 1971, because of the asserted difficulty of applying to the President for Executive Orders to amend the Regulations,⁴⁵ he sometimes issued LBM's and other directives which had the effect of amendments. LBM's 78, 99, 107, 114, 116, and 121 are recent examples.⁴⁶

But at this time the Director had authority only to issue "housekeeping" regulations.⁴⁷ In other words, these substantive LBM's are invalid because beyond the Director's rulemaking authority.^{47a}

D. Informing The Registrant of Duties and Rights

The discussion has concentrated an official system directives, which are disseminated primarily to its employees.⁴⁸ One of Dr. Tarr's earliest and most welcome innovations was to develop materials for dissemination to registrants and others interested in their draft status (i.e., families and employers of registrants).⁴⁹

⁴⁵ But see text after note 26, *supra*.

⁴⁶ See Appendixes A (LBM 107), B (LBM 121), E (LBM 99) and H (LBM 78, 114, 116) for texts. Also LBM 111, *supra*, note 4, and Letter to All State Directors 00-23 (May 30, 1971), Appendix H. The significance of failure to publish these under the Federal Register Act and Freedom of Information Act is considered in Part III.

⁴⁷ R1604.1 (b) provides:

The Director of Selective Service is hereby authorized and directed:

* * *

(b) To issue such public notices, orders, and instructions as shall be necessary for carrying out the functions of the Selective Service System.

On October 12, 1971, the President delegated full authority to the Director to promulgate rules and regulations under the Act. E. O. 11623.

^{47a} See *Peters v. Hobby*, 349 U.S. 731 (1955) (administrative agency exceeded adjudicatory powers conferred by the President; its action was invalid to that extent).

⁴⁸ Until December 1971, copies of Headquarters directives were not even mailed to board members! See LASD "OAD" (August 25, 1970); LASD No. 790.1 (Jan. 19, 1972); personal letter to state Directors (Oct. 22, 1971). Compensated personnel were (and still are) in large part relied upon to call attention to and review with members of the board [at local board meetings, which occur only once or twice a month] any new or [?] pertinent memoranda, directives or policy statements received since the last board meetings. *Inspection Services Bulletin*, Nov. 1971, at N-8.

This system continues to be unworkable. *Insp. Serv. Bull.*, Dec. 1971, at D-12, reporting on November inspections of 321 representatives local boards in 28 states, noted that one problem was "[n]ew directives not discussed."

At board meetings, executive secretaries typically summarize both the facts of cases presented and what they take to be the applicable rules and guidelines. Such a system is not unlike a nurse describing a patient's symptoms and all relevant illnesses to an ignorant doctor who then is expected to make an accurate diagnosis. Reliance on such a haphazard system in this time of massive changes in standards and procedures betrays a serious lapse of administrative judgment.

Even effective dissemination of directives would not suffice at this time. The Chief of the Public Information Office at Headquarters recently told me that both compensated and uncompensated personnel (i.e., executive secretaries and board members) are thoroughly confused about the myriad recent changes in policy and procedure. So, to be honest, am I, and so are most draft counselors and lawyers.

In this context, establishment of a training program for board members, including a staff examination for knowledge, is indicated. I would be happy to cooperate in developing such a program.

⁴⁹ In theory, some Headquarters issuances (e.g., LBM's and the RPM) are available to the public by GPO subscription. The printing delays are so extreme, however, as to deprive such subscriptions of all usefulness. The standard lag between issuance and GPO subscription mailing of LBM's is seven months. E.G., LBM 73 was amended June 14, 1971 but not received by subscribers until January 1972.

In 1970 the Public Information Office prepared and widely disseminated brochures on specific deferments and the lottery system and a *Curriculum Guide* for use in high schools. These were useful although far from complete. Work was later begun on a *Manual* for draft counselors; I was a consultant for this latter effort.

Unfortunately, the impetus of this program has flagged over the last six months, just when it should have picked up. One reason, of course, is that some regulatory changes are not yet firm. But many important matters have been fixed for some time. For example, no brochures have been issued⁶⁰ about the broadened exemption for surviving sons introduced by the 1971 amendments to the Act, although the regulation governing this has been final since December 1971.⁶¹ Nor has complete information been communicated about the new 1-H classification which is significant for registrants from the moment of registration.⁶²

Moreover, Headquarters has apparently now decided not to issue the *Counselor's Manual* but to convert it into a guide for Advisors to Registrants after deleting certain important parts.

The documents issued to registrants with which I am most familiar are System Forms.⁶³ Form 150 was discussed earlier.⁶⁴ Form 110, Notice of Classification, informs registrants of their board's decision on classification requests. This Form carries or will carry⁶⁵ notices of various rights (to personal appearance before local board, appeal and personal appearance before appeal board, to transfer the latter), obligations (to inform board of changes of address and status), and other matters (availability of Advisors to Registrants⁶⁶). Nowhere, however, does the notice warn registrants that if they fail to appeal they will never be able to secure judicial review of their board's decision.⁶⁷ This information should be added to the notice, but Headquarters has apparently decided not to do so.⁶⁸

III. PUBLICATION OF DIRECTIVES IN THE FEDERAL REGISTER

Mr. Chairman, when the Administrative Practice and Procedure Subcommittee held hearings in late 1969 on the administration of the Selective Service Laws, Thomas Alder, President of the Public Law Education Institute, testified that the Selective Service System lacked procedures to solicit comment on its Regulations and directives before issuing them in final form. The thrust of that testimony was that the President or the Director might avoid administrative disruption and litigation over ambiguous regulations by establishing a notice and comment procedure, quite apart from the Administrative Procedure Act, whose pre-publication provisions did not apply to the Selective Service System.

⁶⁰ Press releases summarizing these changes have been issued, as seen above. These rely, however, on the interest and comprehension of the press for ultimate dissemination to registrants. In fact, brochures themselves are not automatically sent to registrants; this can and should be done. See *Report of the National Advisory Commission on Selective Service* 32 (1967) (Marshall Commission Report).

⁶¹ R1622.54 (Dec. 10, 1971). The same is true of the broadened exemption from registration and service for various classes of aliens. R1622.42 (Dec. 10, 1971).

⁶² Registrants not likely at a particular time to be inducted are placed in 1-H, which is a "holding" classification: 1-H registrants cannot be inducted, and their claims are not processed. See RPM 622.18.

⁶³ Forms are considered to be Regulations. R1606.51. The Director proposed revoking this section, however, on January 12, 1972.

⁶⁴ See note 11, *supra*, and accompanying text.

⁶⁵ The first printed batch of Form 110's adopted for optical character reading (OCR) lacked all notices. Separate statements are supposed to be included with these when mailed.

⁶⁶ Some boards do not, however, have Advisors.

⁶⁷ This is because of the judicial doctrine requiring "exhaustion" of administrative remedies as a condition precedent to judicial review. See text after note 27, *supra*.

⁶⁸ General Counsel Walter Morse, in correspondence last fall with Nathan S. Smith, Esquire, indicated that Mr. Smith's suggestions on this point were being considered. However, the notice accompanying Form 110's mailed in January and February 1972 do not refer to the bar on judicial review. This notice and the exchange of correspondence between Messrs. Morse and Smith are in Appendix I.

The subcommittee adopted the suggestion in its Report, and, in January 1970, the Administrative Conference of the United States made a comparable recommendation, urging all agencies having statutory exemptions from the Administrative Procedure Act wherever possible to adopt rule-making procedures on the APA model. Several agencies, including the Veterans Administration, have followed this recommendation, but the Selective Service System, whose Director, General Counsel and Assistant Counsel have served successively on the Conference, declined to promulgate procedures which would bring it in line with general agency practice. In mid-1971, with no agency action forthcoming, the Senate unanimously adopted an amendment to the Military and Selective Service Act of 1971 which mandates a 30-day period for comment after a proposed regulation is first published in the Federal Register. As amended, this provision (§ 13(b)) now reads as follows:

All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act, except as to the requirements of § 3 of such Act. Notwithstanding the foregoing sentence, no regulation issued under this Act shall become effective until the expiration of 30 days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirement of this subsection may be waived by the President in case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued.

The uncertain and incomplete manner in which this statutory command has been implemented since it went into effect on September 28th, 1971, deserves the scrutiny of this subcommittee.

Section 13(b) contains two ambiguities which have required early interpretation by the System. In the lesser matter, the System construes § 13(b) to mean that every time it modifies a proposed Regulation as the result of comments it receives, the revised version must be treated as a new Regulation and consequently must be circulated for a second ten-day review to certain federal agencies, followed by a re-publication for 30 days of public comment. The ten-day review was added by Executive Order 11623, which implements the amendment to § 13(b) and codifies intragovernmental review procedures. Under the interpretation given § 13(b) by the System, a proposed Regulation which undergoes any material change after comments have been received will not become effective until 80 days or more from the time it was first circulated to the appropriate agencies under the Executive Order. This second pre-publication has been cited by the System as the reason for delay in the implementation of certain new statutory provisions.

Standing alone, § 13(b) supports the interpretation given to it by Headquarters: the use of the term "such regulation" suggests the *same* regulation. But § 13(b) can be interpreted in the light of the comparable provision of the Administrative Procedure Act, 5 U.S.C. § 552(d), which reads: "the required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . .". Here the term "a substantive rule" raises the same question that "such regulation" does: when is a revision so substantial that it constitutes in effect a new regulation or substantive rule? If the System would look for guidance on this issue to agency practice under the rule-making section of APA, it would have a strong and precedented basis for relaxing, in many cases, its present rule on multiple pre-publication. The above-mentioned recommendation of the Administrative Conference to agencies having statutory exemption from APA, urging that they adopt APA-type procedures, adds further validity to the search for an APA precedent covering a problem arising under § 13(b).

Delay in implementing the 1971 Act cannot, in any event, be fairly laid at the foot of the new pre-publication requirements. Wherever the respon-

sibility for this delay rests, the bulk of it occurred between August 4th, when the Conference Report containing all provisions of the final Act passed the House, and October 12th, when the President issued Executive Order 11623 implementing § 13(b). Those who recall that the very substantial 1967 regulations were issued in final form within a *week* of the President's signature on the Act will find it difficult to understand why, during the long Senate debate on the Conference Report, Headquarters could not have developed many of the proposed regulations implementing statutory provisions which were agreed to by both House and Senate conferees on July 30th. In fact, this witness personally suggested such a course to Headquarters at the beginning of August 1971.

It is thus difficult to understand how the ten-day agency review compromise reached in E.O. 11623 substantially delayed issuance of the proposed Regulations if the Regulations could in fact have been completed and circulated before October 1st.

Finally, during discussion of the proposed amendment to § 13(b) in the early summer, Headquarters representatives indicated that in the case of some recent Selective Service Regulations, agency review had taken up to seven months. Against that historical record, the ten-day review compromise embodied E.O. 11623 should greatly expedite, rather than retard, the preparation of new Regulations. This reduction in the time required for agency review certainly overshadows the effect of the 40-day, or even 80-day, delay resulting from the new pre-publication requirement of § 13(b).

Headquarters' expressed impatience with this requirement is, however, cause for some concern. In his February 28, 1972 testimony before the Administrative Practice and Procedure Subcommittee, the Director acknowledged that he found the pre-E.O. 11623 system of amending the regulations onerous because it required them to be issued by the President in the form of Executive Orders. To avoid this burden, he conceded, some amendments before October 1971 were framed as Local Board Memoranda (LBM's).^{55a}

May one not fear that Headquarters will be tempted to use similar means to avoid the publication requirement of § 13(b)?

Experience over the last five months provides convincing evidence that such fears are indeed fully justified and that a broad interpretation of § 13(b) is therefore indicated.

The System takes the position that *only* those directives denominated "Selective Service Regulations" and codified in Part 1600 *et seq.* of 32 C.F.R. must be prepublished. At the same time, it has inconsistently attempted to convert many sections of those same Regulations⁵⁶ to more informal directives. The examples of this are legion, particularly in the amendments proposed November 3-5, 1971. Some Regulations have simply been revoked, later to appear as sections of the RPM⁶⁰ or otherwise. The most distressing example of this is the proposed revocation of R1606.51, which for more than twenty years has made SSS Forms part of the Regulations. These are the main vehicle of direct communication between the System and registrants. There is no more sensitive group of directives on which public comment ought to be solicited and carefully weighed. As if to prove this very point, the Director has prepublished proposed Form 150, the Special Form for Conscientious Objectors, because the first draft, officially leaked to CO groups, had provoked such intense criticism.

Other Regulations were stripped of specific standards and procedures, such

^{55a} See text at note 26a, *supra*.

⁵⁶ Provisions of 32 C.F.R. Part 1600 *et seq.* are herein denoted "Regulations." Other directives may be referred to as regulations. As noted earlier, other directives include Letters to All State Directors (LASD's) and The Registrants Processing Manual (RPM) as well as four other manuals, three bulletins and six minor issuances. See note 41, *supra*.

⁶⁰ E.g., R1655.4, 1655.6, 1655.10, 1655.11, and 1655.20 were revoked either on November 3 or January 12. They governed various aspects of processing of overseas registrants. These matters are now covered exclusively by RPM Ch. 655, which also introduces additional major processing changes. R1621.4, 1621.5, 1621.6, 1621.7, 1621.8, dealing with preparation for classification, were similarly revoked, presumably to be replaced by RPM Ch. 621, to be called "Preparation For Classification." RPM Index.

language being replaced by phrases like "according to the rules prescribed by the Director" or "under such rules and regulations as the Director may prescribe," these again to appear in the RPM or elsewhere.⁶¹

Where this occurs, the standards and procedures appearing in the lower-level directive may or may not vary from those previously found in the Regulation. More important is the fact that henceforth, under Headquarters's interpretation, such standards can be amended without need to comply with Section 13(b). In short, Headquarters has ignored its own announced interpretation of this provision in order later to be able to profit from that interpretation.

It should not be surprising, then, that Headquarters has also promulgated in the RPM directives of such significance that they must be considered "regulations" under any workable definition of § 13(b). The new I-H system, the most significant administrative reform in years, is the prime example. It was promulgative by means of the device last discussed, which meant that public comment was thoroughly frustrated. The new I-H (holding) classification was established November 3, 1971, by new R1622.18, the entire text of which read

In Class I-H shall be placed any registrant who is not currently subject to processing according to these regulations⁶² and the rules prescribed by the Director of Selective Service.

No "rules" were issued in November or December, when the above Regulation was adopted. Many subscribers called our offices during the 30-day comment period to inquire where the regulations on I-H were. There were none.

Then at the end of January I received section 622.18 of the RPM—never published in the Federal Register—which defines seven different categories of registrants eligible for Class I-H and five groups who are ineligible. By this time we were even getting calls from registrants, for all new registrants are eligible, are in fact required to be classified in I-H.

Some RPM provisions, such as RPM ch. 613, Procedures for Registration and creation of a Registrant's Selective Service File, have introduced changes in procedures which bring them into conflict with the Regulations.⁶³

This problem is not limited to RPM sections, although it certainly is severe enough in the few chapters issued thus far to justify firm guidance from this subcommittee. Myriad LASD's have been issued since September 28, 1971—some twenty by rough count between October 1 and the end of January, if all miscellaneous "telephone messages," telegrams and identical "personal" letters from the Director to State Directors are included. Many of these are concededly not of regulatory significance. But some undeniably are regulatory, particularly those discussed between notes 41 and 42 above and printed in Appendix G.

It is imperative that a broader, more functional interpretation of § 13(b) be adopted by the System. I would propose the following dual test: First, amendments to any provision which was part of the Regulations on September 28, 1971 must be published for comment. Second, any Headquarters directive must be prepublished for comment which (1) is mandatory in tone or probable impact on board or State Director action and (2) so substantially affects the classification and processing of registrants that (a) board

⁶¹ E.g., R1631.2, 1631.5 dealing with the new system of allocating induction calls on a uniform basis (the National Call). These rules appear as RPM Ch 631. Also, R1604.2 and 1604.52, which previously established the minimum number of members for local and appeal boards. Now this matter is covered by LASD! See LASD's GC-1 and GC-2 (Nov. 10, 1971).

⁶² The other Regulations gave only minimal additional details. R1625.2(b) provided the local board may also reopen and consider anew the classification (1) of a registrant in Class I-H who becomes subject to processing according to these regulations and the rules prescribed by the Director, and (2) of a registrant in any classification for the purpose of classifying him I-H according to these regulations and the rules prescribed by the Director.

R1623 adds "I-H" to the list of classes. No other Regulations refer to I-H at all.

⁶³ Proposed R1621.9. See text between notes 44 and 45, *supra*.

failure to observe it or (b) judicial invalidation of it would result in judicial invalidation of induction orders.

This standard is both workable, fair, and conducive to administrative and judicial efficiency.

Workability

The detailed evaluation in Part II of this statement gives some idea of the range of directives likely to play a significant role in judicial review. One line of cases is particularly relevant: those holding that the system must follow "rules" contained in directives other than Regulations.⁶⁴

Judicial and Administrative Efficiency

This broad test will both promote efficient administration and minimize waste of judicial resources. It will first of all remove the incentive to evade Section 13(b), which will minimize litigation—some of which is already threatened—over alleged violations of the prepublication rule itself; it will also minimize the number of processing actions likely to be voided and thus to have to be duplicated on this basis, or because boards fail to follow directives due to their informality.

Resort to § 13(b) will result in more mature policy decisions and more carefully drafted directives, because of both internal and external review and comment. This in turn will minimize other litigation, particularly challenges to induction orders, which also require wasteful reprocessing when successful.

Fairness

Finally, for much the same reason, the suggested test will promote fairness to registrants. They will have adequate notice of and an opportunity to participate in the rules binding them. The rules will thus be as equitable and clear in meaning as possible. Thus fewer will be inducted through ignorance and the threat of prosecution, and fewer will be forced to run the gauntlet of prosecution to secure judicial review.

Senator KENNEDY. That is an excellent statement and very complete. We will go to Mr. Shattuck. We are going to run into a time problem here. We have another panel and another witness. We are going to have more votes as we move on through the afternoon. I want to see if you can begin to summarize these and just catch the highpoints. We will put all of the material in the report.

STATEMENT OF JACK SHATTUCK, AMERICAN FRIENDS SERVICE COMMITTEE

MR. SHATTUCK. First, I would like to add to the record the regulation to which Mr. Karpatkin was referring to earlier and Dr. Tarr alluded in terms of the opportunity to extend the appeal time. The 30-day appeal regulation is still in effect and until the 15-day regulation goes into effect, which has been hanging in mid-air since January 12th. It reads as follows, and this is from 32-C.F.R. section 1626.2 (d):

At any time prior to the date the local board mails to the registrant an Order to Report for Induction (SSS Form 252), the local board may permit

⁶⁴ See text at note G and note 26, *supra*. A very recent and important example is *Naskiewicz v. Local Bd. No. 61*, 5 SSLR 3168 (2d Cir. Feb. 18, 1972), which held that failure to follow LBM 121 (Appendix B) invalidated an induction order. Preinduction review was allowed (see note 13, *supra*). See also *United States v. Bagley*, 3 SSLR 3585, 436 F.2d 55 (5th Cir. 1970) (LBM 82); *United States v. Davis*, 2 SSLR, 3170, 413 F.2d 148 (4th Cir. 1969) (same); *Talcott v. Reed*, 217 F.2d 360 (9th Cir. 1954) (State Director Advice); *United States v. Stout*, 2 SSLR 3280, 415 F.2d 1190 (4th Cir. 1969) (LBM 41 interview).

any person described in paragraph (c) of this section to appeal even though the period for taking an appeal has elapsed if it is satisfied that the failure of such person to appeal within such period was due to a lack of understanding the right to appeal or to some cause beyond the control of such person.

This is still in effect. Certainly that seems to be rather flexible.

I would like to summarize for you if I could, some of the points in my prepared statement. Let me indicate first of all, that the American Friends Service Committee is not an organization devoted full time to problems of the draft. It is a Service Committee founded in 1917 originally to work with problems of members of the religious society of friends in determining how to meet their conscientious responsibility during the First World War and has continued over the years to try to meet young men's problems with the military in terms of matters of conscience. Therefore, it maintains many of the offices with draft programs—including one in New York which I am the coordinator—and uses many counselors. Counseling is done by about two dozen volunteers. This is typical of many offices and draft counseling centers throughout the country. Persons manage to turn to us because they feel apparently because of the friends' peace efforts and because of I assume the information we provided over the years that they could find a reliable source of information there. I am also speaking as my prepared statement indicates, out of my own experience with Selective Service System, and being a draft counselor for the past 7 years. The points I indicated in my prepared statement explain what I understood to be Selective Service responsiveness to additions and reforms approved by Congress and adopted into law September 28th.

I have various point listed that indicate that in some cases for registrants, the opportunity for procedural changes which were allowed by the law were put into effect by Dr. Tarr in the system in a manner substantially earlier than the regulations provided; and those among them were various registrants' rights which would benefit them; they have been delayed and slowed down.

Just to point out the various points that are covered in my presentation; under limiting registrants sooner than properly authorized, I note elimination of 2-S, student deferment.

Dr. Tarr sent a letter to all college registrars suggesting that the Selective Service Form 109 not be used on behalf of incoming freshmen, citing the potential abolition of such student deferments and extended liability afforded students as a result of such deferments. On September 22, 1971, Dr. Tarr issued Local Board Memorandum No. 122, directing draft boards not to grant such deferments, expecting them to be short-lived. These steps were prior to approval of Public Law 92-129 on September 28, 1971, giving the President the option of eliminating those 2-S deferments. No authority was cited by Dr. Tarr for his policy in LBM 122, which violated selective service law then in effect. When the regulations finally went into effect in December, between September and December, registrants who did not receive these deferments were prejudiced and in fact some men may have been inducted as a result

of not getting their deferment and right to appeal and other benefits conferred by Congress.

(The following comment on Mr. Shattuck's statement was subsequently submitted by the Selective Service System:)

During the brief period between the enactment of the Military Selective Service Act by the Congress on September 21, 1971, and its signature into law by the President on September 28, 1971, the Selective Service System considered that the Congress had expressed its intent and accordingly, it was decided that the administration of the System should conform to the legislative intent. Section 17 of the amending legislation repealed Section 6(h)(1) which was the statutory basis for the 2-S college student deferment. However, the amendment represented by Section 22(b) of the Act provided that those who met the academic requirements for a student deferment under the previous legislation and who were satisfactorily pursuing a full-time course during the 1970-71 regular academic year should continue to be deferred. Thus, those entering college for the first time in the 1971 summer session or later would not be entitled to the previous statutory student deferment.

Therefore, Local Board Memorandum No. 122 merely instructed the boards to delay classification of such students into Class 2-S since the anticipated new legislation, by omission, would retroactively remove the basis for such classification. In other words, to continue to classify into 2-S one who would shortly be ineligible for such class was a pointless and useless processing step since such an individual would have to be reclassified as soon as the new Act became effective. The delay in taking a classification action which, in a very short period of time, would no longer have a statutory basis, served to eliminate confusion and uncertainty for the registrants affected. It is believed that the processing directive, Local Board Memorandum No. 122, did not exceed the Director's discretionary authority.

Another one was the elimination of the 1-Y medical disqualification deferment. By November 24th, State headquarters around the country were already distributing a national headquarters directive about what changes would go into effect December 10th, they haven't even waited for the comment period to go through before they knew exactly what the changes would be and exactly when they would go into effect.

The situation with the medical deferment is very important because this has a tremendous effect upon young men in terms of the number of people alone. This is probably the largest classification of persons since the student deferment is fading out. This would be persons who are covered by medical and physical and mental disqualifications under this classification.

The 1-Y classification, as previously existed, is being phased out and you can become either 1-A or 4-F. Now, as to why you should be 1-A, that is somewhat of a question. Previously these men were examined and found to be not acceptable at the present time and acceptable only because of the standards that would exist at times of war and national emergency.

They are called now 4-F but the same standards still apply but as far as the information in their file, nothing has changed. No new material is presented.

Those men being reclassified into 1-A are being classified that way as a result of the statement from the Armed Forces examination and entrance station--AFEES--to the effect that reexamination may be justified in a period of 6 months or a year or something of that nature. This proposal in a statement from the Armed

Forces examination and entrance station is being used to determine whether these men are 1-A or 4-F, despite the lack of information in their file supporting that conclusion, including any previous medical histories.

This certainly is not justified anywhere in the law and in fact the situation came up over a year ago in September of 1970 when the temporary successor to General Hershey issued two letters to all State directors which called attention to the problem, and he noted specifically that registrants who have been found unacceptable by the AFEES with reexamination believed justified on DD form 62 (notice of acceptability) shall be considered for reclassification in class 1-Y immediately after receipt of DD form 62. The recommended time interval before the reexamination specified by AFEES shall have no influence upon consideration of such registrants for classification in class I-Y."

In other words, one should put this man in a status on the basis of a recommendation for an examination when an examination might be justified. This statement, reissued on October 22, 1970, was deleted only because this entire LASD was itself rescinded by another issued local board memorandum, LBM 121, which was not prepublished, generally spells out the criteria for the medical appeal procedure in determining reclassification.

The medical situations are those that are most confused—and I would call the Senators' attention to this specifically because the Selective Service System does not treat medical claims as making a *prima facie* assertion of a disqualification or qualification for a given classification of other than 1-A. Previously persons were entitled to a medical interview with a medical adviser to the local board.

If he presented a *prima facie* case by doctor's letters, etc., to a local board, he would be entitled to a mandatory medical interview. That was rescinded when, in a court case, the court said it was in fact mandatory. *Benitz-Manrique v. Micheli*, 305 F. supp. 334, (D.P.R. 1969) But now it is only advisory. If a man presents a *prima facie* medical claim, the local board does not pass upon his classification. Instead it passes the information directly on to the examining station and so it fails to take any action on it unless it gets some recommendation there and the recommendation may be for some examination sometime in the future.

This totally was contrary to what had been required by a ruling of the 1st Circuit Court and the 9th Circuit Court, the latter of which was made only in the past weeks. Selective Service still has not accepted the position that this is a requirement and is not complying with this.

(The following comment on Mr. Shattuck's statement was subsequently submitted by the Selective Service System:)

The real issue here seems to be the legality and fairness of the new selective service policy of retaining in Class 1-A those registrants who have been only temporarily disqualified for service.

First, the two Letters to State Directors which were cited in the testimony as being the governing authority for placing temporarily disqualified registrants in

Class 1-Y were rescinded on June 25, 1971. Hence, it cannot be charged that Selective Service's new policy contradicts these two letters.

Second, even if there were such a contradiction, the new Selective Service Regulations, not the two Letters to State Directors, would take precedence and would be the authority in the matter.

Third, the new policy is fairer to the registrants in question, in that it allows them to know exactly where they stand regarding Selective Service. The old practice of classifying registrants 1-Y often created hardships for registrants who, believing they were permanently rejected for service, began raising families, buying homes, and entering careers only to learn a few months or a year later that they were no longer disqualified for service.

The new policy therefore is not superseded by any other issuances, and is in the long run far more fair to the registrant.

Mr. Chairman, my other points in this prepared statement deal with the elimination of the Government appeal agent and specifically I am referring here to various publications in the Federal Register of proposed regulations and other issuances by Selective Service in a letter to all State directors which go ahead and put this into effect speedier than was provided. I have some flagrant examples here which I perhaps can supplement into the record at another time.

The next point is the reduction of the appeal time from 30 to 15 days, which has been covered previously. The Selective Service stated in a letter to all State directors that a new "Notice of Right to Personal Appearance and Appeal" was being printed to conform to the newly proposed regulations.

Senator KENNEDY. We are running out of time. I just want to be fair to some of the witnesses, so I am really to go try and see if we can't tighten this up a bit.

Mr. SHATTUCK. All right, Mr. Chairman. I would then provide for the subcommittee additional information documenting these points both as in my statement and those that have been further called to light here.

I might also call to the attention of the committee my own personal experience here with the Selective Service System in terms of information. The Office of Public Information of the Selective Service in Washington has been most helpful and I would like to call the attention of the subcommittee to the persons coming in since Dr. Tarr: Ken Coffey, Tim Kelly, William Holmberg, Ed Wells, Pat McGarvey, and their associates in terms of what information they can provide.

I think it is important to recognize the efforts they have done to provide information but in any event there seems to be some kind of a question within the system as to what information is available through its own public information office.

As one example I have appended to my statement a subject index to the major or national directives and which of these directives have been in effect since January 1st. There appears to be no Selective Service index to their own operational procedures even though they have issued an administrative bulletin outlining the methods by which an index shall be issued and where it would be fit in. So, I have appended an index for the subcommittee for the purposes of general information.

As I said, I will try to present additional information.

Senator KENNEDY. Very good. Thank you. That was a very fine statement.

(The amended statement of Jack Shattuck follows:)

AMENDED STATEMENT OF JACK SHATTUCK, DRAFT COUNSELOR COORDINATOR FOR THE
AMERICAN FRIENDS SERVICE COMMITTEE

I am Jack Engel Shattuck, and I speak as the coordinator of volunteer draft counselors for the American Friends Service Committee in New York City, who last year under my direct supervision counseled 3600 young men on their relationships with Selective Service. I have been a draft counselor myself with the Jewish Peace Fellowship for the past seven years, and during 1971 served as Co-Director of the Military and Draft Law Panel of the American Civil Liberties Union of New Jersey. My experiences stem from those and related affiliations and activities.

The following statement presents my understanding as regards Selective Service response to Congressional intent and explicit law adopted in PL 92-129, 85 Stat. 348, approved September 28, 1971. The first section relates the accelerated denial of certain benefits previously in effect, more swiftly removed than allowable by law. A second part of this presentation demonstrates the failure to promptly and properly accord new procedural rights favorable to the registrant. In sum, it is intended to show the complete variance of recent Selective Service policies from the expressed ideas and the mandates of Congress.

I. LIMITING REGISTRANTS' RIGHTS SOONER THAN PROPERLY AUTHORIZED: MAKING
MEANINGLESS THE 30-DAY COMMENT PERIOD

A. Elimination of the 2-S Student Deferment

On September 3, 1971, Director Curtis W. Tarr sent a letter to all college registrars suggesting that Selective Service Forms 109 (indicating student status) not be issued on behalf of incoming freshmen, citing the potential abolition of such student deferments and extended liability afforded students as a result of such deferments. On September 22, 1971, Dr. Tarr issued Local Board Memorandum No. 122, directing draft boards not to grant such deferments, expecting them to be short-lived. These steps were prior to approval of PL 92-129 on September 28, 1971, giving the President the option of eliminating those 2-S deferments. No authority was cited by Dr. Tarr for his policy in LBM 122, which violated Selective Service law then in effect.

The President, by Executive Order No. 11623 of October 12, 1971, gave the Director authorization to issue certain Selective Service regulations in his name. Regulations abolishing freshman 2-S deferments were published in the Federal Register November 3, 1971, and were not announced as effective until December 10, 1971.

This delay between September and December is not insignificant when put in context of a 20-year-old who, if granted the 2-S until December 10, 1971, would not only have been thereby unavailable for November and December inductions (the only calls between June, 1971, and April, 1972, at the earliest)—but who also would have then received automatic rights to personal appearance and appeal, subject to the new procedural rights of witnesses, quorums, statement of reasons for denial of claims raised and appellate appearance opportunity. The student denied the 2-S and continuing his previous status of 1-A would have no such rights, something not pointed out by Dr. Tarr in his letter to all college registrars; indeed, he might well have been inducted by now.

B. Elimination of the 1-Y Medical Disqualification

On November 3, 1971, the Federal Register carried the proposed elimination of Classification 1-Y. By November 24, 1971, Selective Service had already

issued a Telegram to all State Directors (from Dr. Tarr) outlining what changes would result on December 10, 1971, for those currently holding 1-Y, although at least ten days still existed for comments, let alone analysis of those comments, on the proposed change. This would seem to suggest that not only had Selective Service no intention of considering any comments, but that they had the exact date already set as to implementation of the change. On December 9, 1971, the Federal Register announced the change effective as of December 10, 1971.

Elimination of the 1-Y was discussed in Question and Answer form in Selective Service News published by the Office of Public Information in January-February, 1972. The holding of Class 1-Y was there termed merely a "procedural delay" and resulting in confusion to the registrant; therefore the classification was found in need of abolition.

However, the same standards for medical disqualification still apply, and Selective Service ignores Supreme Court requirements that men with prima facie disqualifications have the right to obtain reopening of classifications, *Mulloy v. United States*, 398 U.S. 410 (1970), explicitly applied to medical claims by *United States v. Ford*, 431 F. 2d 1310 (1 Cir. 1970) and *United States v. Miller*, No. 71-2040 (9 Cir. Feb. 11, 1972). The accompanying procedural rights which Dr. Tarr once again neglected to elaborate upon are the "procedural delays" referred to in Selective Service News.

C. *Elimination of the Government Appeal Agent (G.A.A.)*

On November 3, 1971, the Federal Register carried the proposed elimination of the Government Appeal Agent. On November 15, 1971, still within the first half of the comment period, Selective Service issued Letter to All State Directors (00-45), also using the December 10, 1971, cut-off date for utilization of the G.A.A. The conclusions cannot but appear the same as in B, above.

Further, Selective Service state headquarters acted so promptly on the suggestion in LASD (00-45), that some G.A.A.s concluded their work before the December 10 date—even when registrants still were awaiting their service.

Although the G.A.A.s were abolished in part because of an apparent conflict of interest (recognized long before by the California Bar Association, A.B.A., New York State Bar Association and Selective Service's own National Youth Advisory Committee), Selective Service now placed such men onto the local boards of the registrants they had advised. Some local boards are virtually all composed of former G.A.A.s.

An extreme example of the problems here are reflected in the following actual case:

Joseph D. from New Jersey was reclassified after graduating college and asked to see the Government Appeal Agent to ascertain his rights. Ignored for 8½ months despite repeated requests, he was ordered to and passed a physical examination, continuing to be held in a status available for induction, which he wished to contest.

Finally learning from other sources his rights to claim certain exemptions, he was berated by the board for seeing a draft counselor and denied personal appearance rights. The Government Appeal Agent eventually intervened, but the local board refused to explain their actions in denying his claim. The Operations Chief at State Headquarters acknowledged that under the relevant Ct. of Appeals decision, *Scott v. Commanding Officer*, 431 F.2d 1132 (3 Cir. 1971), which the registrant had inserted in his file, his asserted right to reasons from the board was "the law of the circuit, but not the law of Selective Service" and ignored the "law of the circuit" until National Headquarters intervened. Refusal of induction had been averted only due to the G.A.A. intervention once more.

The Local Board, No. 14 for New Jersey, then gave its reasons for rejecting his claim—lateness in filing (resulting from waiting for the G.A.A. meeting which was promised, but ignored)—and refused once again to grant appeal rights from its findings.

The G.A.A. was provided with legal arguments against the board's action

and ordered the file set aside until he completed reviewing it. After two months, the G.A.A. was contacted on November 26, 1971, for the results, but the Agent had resigned and pursuant to NASD (00-45), had now joined the draft board as a member. While all the registrants at Local Board 14 were left without a Government Appeal Agent for several weeks, the local board now contained 5 ex-G.A.A.s among its 6 members. It was not explained whether or not those former Agents stepped aside to avoid conflicts of interests when registrants they'd advised appeared before the board. The newly appointed G.A.A. is and was a member of the law firm serving as general counsel to another board member's business firm.

The registrant finally obtained a reopening through the help of a draft counselor—this subcommittee's present witness.

D. Reduction of the Appeal Time from 30 to 15 Days

On January 12, 1972, the Federal Register carried the proposed reduction of appeal time from thirty to fifteen days. Within two days thereafter, Selective Service stated in Letter to All State Directors (00-54) of January 14, 1972, that a new "Notice of Right to Personal Appearance and Appeal" was being printed to conform to the newly proposed regulations. Rights outlined in previous notifications would be suspended "upon receipt" of the new notice which was to be distributed in "the most expeditious manner." Further, a sample letter to registrants found at page 622.18-5 of the new Registrants' Processing Manual, issued January 14, 1972, also accepts the proposed 15-day appeal period as fact. This clearly indicates any thoughts of changing the intention of Selective Service would be useless.

In fact, what has happened is that those new notices have been delayed and registrants are being reclassified *without any notice* being sent them as to their obligation to reply within 60 or 30 or 15 days and thus they are in danger of losing *any* appeal period, whatsoever.

II. LIMITATIONS ON RIGHTS FAVORABLE TO REGISTRANTS AND GRANTED BY CONGRESS

A. Right to Appear Before Appeal Board and Obtain Statement of Reasons for Adversely Decided Claims

On September 28, 1971, the President signed into law PL 92-129, including Sections 22(b) (1) and (b) (4) of the Military Selective Service Act, granting the registrants' right to personal appearance and statement of reasons for adverse decisions at either local or appeal board level. These rights were pursuant to such rules and regulations "as the President may prescribe," such regulations having to be published in the Federal Register for a 30-day comment period, according to Section 13(b) of the Military Selective Service Act.

The President issued no rules and regulations on the subject, and none were pre-published in the Federal Register.

On November 2, 1971, Dr. Tarr issued a telegram to all state directors ordering classification to resume *under the law of 1967* for those cases filed for appeal whose time to request an appeal expired prior to September 28, 1971. However, where appellate requests could be made on or after September 28th (within 30- or in some cases, with 60- day periods prescribed by the Regulations), no appeal classifications were to be made, said the Director. No appeal classifications in fact were occurring at the time since the Director had ordered them suspended in a personal letter to all state directors of October 1, 1971.

Further, registrants still awaiting appeal actions were not advised of their new rights to appear at appeal boards or to obtain statements of reasons when claims were rejected by local boards. This could have been done during the previous 32 days in which the Director had suspended appeal classifications, and in many cases also could have been undertaken in the time it took (subsequent to November 2, 1971) for appeal boards to get to all the cases awaiting their attention.

In at least one state, as late as January 12, 1972, the Legal Counsel to a State Director refused to concede those rights to a registrant whose case was

not passed upon until over two months after Congress granted such rights. The registrant had requested the right to an appellate appearance on October 1st, and upon denial of his claim, sought reasons (in early December). The Legal Counsel stated that no regulations were in effect requiring a statement of reasons (ignoring the Act of Congress), and the registrant was therefore not entitled to them. The Selective Service officer declined to comment on the failure to allow an appearance although he had forwarded that request to the local board on October 8, 1971, "in order that your rights may be protected."

In a telephone conversation with me, the Legal Counsel admitted that the reason he was ignoring PL 92-129 was the fact that he felt bound by the November 2nd Telegram of Dr. Tarr.

When the Military Selective Service Act was changed in 1967 to *omit* a then procedural right of appeal, the information about Conscientious Objector claimants obtained from a Justice Department hearing, Selective Service took a different viewpoint on the speedy implementation of changes in the statute. The matter was raised in *United States v. Haughton*, 413 F.2d 736 (9 Cir. 1969) and *United States v. Mizrahi*, 417 F.2d 246 (9 Cir. 1969). Although one defendant was favorably, and the other unfavorably, affected by the change, two different panels of Judges of the United States Court of Appeals agreed on the same principle.

In *Haughton*, it was found that statutes affecting procedural changes, which do not otherwise alter substantive rights, generally are considered immediately applicable to pending cases. The Justice Department, the Court noted, then held that cases awaiting determination by the appeal board, already sent to the appeal board, should be covered by the new act. This was even applied retroactively to cases sent before the enactment of the new law, but not yet processed. Selective Service then concurred in that view.

Mizrahi held that cases (1) sent to the appeal board after a change is effected by Congress and (2) sent to the appeal board before the change but not yet acted upon should in both circumstances be covered by the new procedures.

Now that new procedures on appeal *benefit* the registrant, it appears as if Selective Service wants to ignore its own past history, as well as the case law enshrining it.

B. Opportunity to Present Post-Induction-Order Conscientious Objector Claims to Local Boards

Prior to April, 1971, local boards followed two contrary directions regarding the hearing claims for conscientious objection made after receipt of induction orders. In those judicial circuits adhering to the rule in *United States v. Gearey*, 368 F.2d 144 (2 Cir. 1966), 379 F.2d 915 (after remand) (2 Cir.), *cert. denied*, 389 U.S. 959 (1967), C.O. hearings were required. But for others subject to courts following *United States v. Ehlert*, 422 F.2d 332 (9 Cir. 1970), C.O. claims were held to be a change in circumstances over which the registrant had control, thus not requiring post-induction-order consideration, in accord with Regulation 1625.2. The Supreme Court, while declining to take sides "in the somewhat theological debates" over the extent of control of one's conscience, chose to accept for administrative reasons the result in *Ehlert* and declined to order boards to hold such hearings while other forums were available. *Ehlert v. United States*, 402 U.S. 99 (1971).

Without explaining the Court's rationale, National Headquarters issued two directives within ten days of the *Ehlert* ruling; Local Board Memorandum No. 111, April 23, 1971, informing local boards that they "may not" consider such C.O. claims, and Memorandum to All State Directors (GC-2), from the Office of the General Counsel, April 30, 1971, advising state headquarters that those claims "cannot be considered" but "must be" submitted to the Armed Forces for evaluation.

Thus the prevailing interpretation of Regulation 1625.2, experience of many local boards, and instructions from National Headquarters were against *any* consideration of post-induction-order conscientious objector hearings when PL 92-129 came into being. Congress declined to overturn that situation by specific

law, but the Committee on Conference, report at page 22, held the understanding "that in unusual cases, local boards would have the discretionary authority of extending to such registrants a hearing on their late claim if the circumstances so warranted."

Proposed Selective Service regulations of November, 1971, sought to rewrite provisions for issuing Special Form 150 for Conscientious Objectors so as to eliminate giving of the Form after induction orders. That was withdrawn after protest, but the current regulations do no more than repeat the previous standard for post-induction-order reopenings of classifications, only available when due to circumstances beyond control of the registrant.

As LBM 111 and the Memorandum to All State Directors (GC-2) remain in effect, unamended as are the regulations on point, given the failure to inform local boards of the expressed Congressional intent, the registrant continues to be denied the will of Congress as if it had never been stated.

Finally, it should be added that State Headquarters continue to issue their own memoranda, perpetuating this problem. Following is one such memorandum:

NEW YORK STATE DIRECTOR,
Operations Memorandum No. 5,
Issued: Jan. 3, 1972.

Subject: Post Induction Claims.

Claims submitted by registrants after the mailing of the Order to Report for Induction (SSS Form 252), will continue to be processed under the provisions of section 1625.2(b) of the regulations. Claims for classification in Class 1-0 or 1-A-0 received by the local board after the mailing of the Order to Report for Induction (SSS Form 252) may not be considered. Written information relevant to such claims shall be placed in the registrant's Cover Sheet (SSS Form 101).

Registrants who have submitted claims for Conscientious Objector status subsequent to the issuance of an induction order shall be advised by letter that the recent decision of the United States Supreme Court in the Ehlert case prohibits such review by the local board. Postponements of induction and discretionary interviews scheduled to review cases of this type should be canceled.

The following sample may be used for these purposes:

For a registrant who has not been postponed for his claim.

"In view of the recent Supreme Court decision in the Ehlert case, your post induction claim for conscientious objector status cannot be considered by the local board. Your claim may be presented to the Armed Forces subsequent to induction."

"Your scheduled induction remains in effect and you should report on the day indicated therein."

For a registrant who has been postponed.

"In view of the recent Supreme Court decision in the Ehlert case, your post induction claim for conscientious objection status cannot be considered by the Local Board. Your claim may be presented to the Armed Forces subsequent to induction."

"Your postponement of induction or discretionary interview, (whichever is applicable), is hereby canceled. Enclosed is a letter giving you a new date to report for induction."

For the State Director
BYRON H. MEADER, LTC, Arty,
Operations Division, Manager.

C. Congressional Mandate That Alternate Service Be Coordinated by National Headquarters Under the Director

On September 28, 1971, PL 92-129 was signed into law, amending Section 6(f) of the Military Selective Service Act, to provide that "The Director shall

be responsible for finding civilian work for persons exempted from training and service . . . and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety, or interest."

Yet on November 5, 1971, proposed Regulation 1660.1(b) was published in the Federal Register and, despite protests, put into effect December 10, 1971. It reads:

"The State director of the State in which a registrant is registered will have primary responsibility for the initial placement of the registrant in alternate service. That State director will coordinate any job placement activities in any state outside his own with the State director of that State. In assigning a registrant outside his own State, the State director must have the approval of the 'receiving' State director *or* the Director of Selective Service." (emphasis added)

Under the above and tangeant regulations, the Director's required involvement arose only if the registrant sought the Director's review of a potential job prior to actual assignment, or whenever the registrant was reassigned. On January 12, 1972, a change was prepublished in the Federal Register to omit the latter provision. Thus, in any involuntary job assignment to alternative service, the registrant could be under complete control of the 56 varying state headquarters' policies.

One result is a fractured administration whereby the same employer could be acceptable to one region but not to another. This policy, without the Director's review, was not the national interest the change in Section 6(j) of the Act sought to serve.

Mr. Karparkin has read into the record one example of attitudes toward the American Friends Service Committee (AFSC). Let me show another view, expressed by the State Director of Ohio in an excerpt from a letter to the Dayton AFSC office Executive Secretary:

"Certainly, the fact that the employer-organization is involved in peace activities should not be used as a basis for determining that other endeavors performed by the same organization are not in the National Health, Safety or Interest. Further, we fully realize that the era when draft counsellors were looked upon by disfavor by the Selective Service System is now past. Selective Service National Headquarters has undertaken an aggressive program to cooperate with draft information centers to the maximum extent possible. I am sure that you are aware that the administration of the Selective Service Law has taken a new direction during the past year and one-half. It is still our position, of course, that a Draft Counselling Service which participates in illegal activities (e.g., counselling registrants to wilfully violate the law) would not be in the National Health, Safety or Interest. However, from your letters, and from the reputation of your organization, it seems clear that your organization does not participate in such illegal activities."

The letter then concludes:

"We trust that our current position is clear. It is not the policy of this headquarters to look with disfavor upon the American Friends Service Committee as an employer in the Alternate Service Program."

I am attaching that letter to this statement, with registrant identification removed, for the subcommittee's reference.

I believe other witnesses here will elaborate further on the ramifications of the failure to have the Director's general oversight for the alternative service program.

D. Prepublication Requirement of Section 13(b) of the Military Selective Service Act, and General Publication of Information.

Section 13(b) of the MSSA, as amended by PL 92-129, requires a 30-day comment period before implementation of proposed new regulations issued under the Act. Such proposals are to be pre-published in the Federal Register. None of the regulatory issnances by Selective Service since September 28, 1971, indicated in the previous discussion, were prepublished with the exception of certain regulations to be incorporated under 32 C.F.R. 1600 *et seq.* Only *some*

of those were published; particularly omitted was a new series of directions and explanations for Conscientious Objector processing.

I would note especially one particular unpublished Letter to All State Directors (00-44), issued November 9, 1971, which is entitled "Policy Statement on Deferment of ROTC Members." Therein Selective Service created a 4-year deferment for certain students, prior to approval of prepublished regulations of November 3, 1971, authorizing such action. This should be contrasted with removal of the general 2-S student deferment, described above.

It is also of interest that when a man joins the military, according to this LASD, his status is presumed to continue that way "until reason for a change in his classification is a matter of record in his Selective Service file"; but if someone held a medical deferment of 1-Y, or if he failed to answer a current information questionnaire, his classification would be changed to 1-A automatically without a basis in fact for that new status being placed in the record.

Continued changes come forth daily, it seems, and still the Act is ignored. On January 1, 1972, Selective Service issued Administrative Bulletin No. 765.1, which says that "all manuals, bulletins and orders or parts thereof will be published in the Federal Register when required by section 3 of the Administrative Procedure Act." That bulletin (itself unpublished), describing Selective Service issuances, noted that among those items having "general applicability and legal effect", by its own description, would be the Registrants' Processing Manual (RPM). Yet on January 14, 1972, in effect "upon receipt", the RPM was issued to local boards without publication in the Federal Register. So far, nothing from Selective Service has been published "as required by section 3" of the APA, even by their own terms, and the new RPM conflicts with previously issued regulations. Mr. Schulz' extended comments are designed to cover this issue more thoroughly.

It is exceedingly difficult to obtain knowledge of current directives of the System. Subscriptions from the Government Printing Office are unsatisfactory when changes issued for a critical topic in June, 1971, reach the subscriber in February, 1972, as recently was the case for several Local Board Memoranda sent to draft counselors in Chicago, New York and New Jersey, I being one of those recipients.

Similar problems arise in determining relevant Army Regulations, such as the induction medical standards. The last change was announced by the Army on August 10, 1971 as effective October 15, but the general public could only obtain the information via the Government Printing Office in late December, 1971, after months of inductions had passed.

Attempts to secure State Headquarter directives explaining policy and interpretation, plus copies of Operations Bulletins, have been rebuffed with the explanation that those items are "internal communication" items. However, Section 3 of the APA, 5 U.S.C. 552(a) (2) (B) explicitly provides for availability of "those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register", and Selective Service's own regulations, 32 C.F.R. 1606.57(d), authorize viewing of Operations Bulletins at local boards.

The so-called *Counselors' Newsletter* issued by the Office of Public Information is only a monthly description—certainly not an index—of National policy changes, and not always complete. That publication itself has stated it could not provide copies of items listed for individuals, and those items have not been published in the Federal Register. I have appended to this statement a Subject Index to Major National Directives of the Selective Service System In Effect on January 1, 1972, to show the diversity and importance of the varieties of regulatory issuances. *Selective Service has no index of its own directives*, Section 3 of the APA not withstanding, once again.

This appended index itself demonstrates the problem of compiling lists of issuances unknown to the public. The November 24, 1971, Telegram to All State Directors covering 1-Y registrants, referred to above, was not indexed because its existence and the method of transmission were not previously known.

Publication of many of these policy statements, by whatever name, generally is required by the Federal Register Act, 44 U.S.C. 1505 and 1 C.F.R. 11.2, in addition to any requirements of Section 3 of the APA and Section 13(b) of the MSSA, as amended.

CONCLUSION

In light of all the foregoing, it is difficult to find an alternative to assuming that the Selective Service System has been grossly negligent or unwilling to acknowledge, let alone protect, rights of registrants covered not only by the Military Selective Service Act, but also by other statutes applicable to administrative agencies generally. Although unpersuaded that conscription can be anything but a deprivation of our liberties, while such agencies exist, and while we adhere to the concept of the rule of law, I urgently request this Subcommittee, the Congress, and the other branches of government to undertake a full investigation of the failures of the Selective Service System to grant appropriate justice to the large proportion, if not all, of our nation affected by its activities.

JACK ENGEL SHATTUCK.

Attachments.

- A-September 3, 1971, Letter to All College Registrars.
- B-Letter to All State Directors (00-45).
- C-Letter to All State Directors (00-54).
- D-Telegram to All State Directors, November 2, 1971.
- E-Local Board Memorandum No. 111.
- F-Memorandum to All State Directors (GC-2).
- G-Ohio SSS Director Letter to AFSC.
- H-Letter to All State Directors (00-44).
- I-Administrative Bulletin No. 765.1.
- J-Subject Index to Selective Service System Directives.
- K-September 3, 1970, Letter to All State Directors.

Attachment A

SEPTEMBER 3, 1971.

DEAR REGISTRAR: The amendments to the Military Selective Service Act of 1967, now before Congress, include a major policy change in undergraduate student deferments. The President has asked Congress for authority to phase-out undergraduate deferments and should the bill pass in its present form, as expected, the incoming freshmen class will no longer be eligible for deferments. Upperclassmen in good standing will continue to be eligible for deferments until they graduate, reach age 24 or cease to make satisfactory progress.

The enclosed release should help you and your staff answer student questions concerning this change. The release is also being sent to the editor of your student newspaper. Anything that your office can do to ensure wide dissemination of this information would be greatly appreciated.

Since, in all probability, student deferments issued to freshmen this fall will be rescinded upon passage of the bill and since deferments extend induction liability until age 35, we hope your office will temporarily suspend the processing of Forms 100 for freshmen until there is final action on the pending bill. I believe this move will be in the best interest of your freshmen students and will reduce the confusion and work load for both your office and our Selective Service boards.

If you or members of your staff have any questions on this new policy, please call our Public Information Office in Washington (202 343-8621). I have asked this office to be prepared to receive your calls.

For many years, the Selective Service System has received your cooperation and support in processing applications for student deferments. For these services, please accept my sincere thanks. Your further cooperation during the period of phasing out student deferments also will be greatly appreciated.

Sincerely,

CURTIS W. TARR.

Enclosure.

Attachment B

NOVEMBER 15, 1971.

To: All State Directors (00-45).

Subject: Government appeal agents.

The proposed changes in the Selective Service Regulations do not provide for the position of Government Appeal Agent. Consequently, these positions will be phased out, consistent with the orderly processing of cases in which Government Appeal Agents are now involved.

While the opportunity to be afforded a registrant to meet with the Government Appeal Agent has not been established as a basic procedural right of the equivalence of the right to a personal appearance or appeal, it is nevertheless desirable that registrants be permitted to have such meetings when a request has already been made. Therefore, Government Appeal Agents are authorized and requested to complete their interviews in any case where appointments with the Government Appeal Agent are scheduled prior to December 10, 1971, and to make recommendations for reopening classifications and take appeals as authorized under the present Parts 1625 and 1626 of the Regulations, until December 10, 1971.

These experienced and dedicated Government Appeal Agents should be considered as a prime source for future local board members, appeal board members, and advisors to registrants.

DANIEL J. CRONIN,
Assistant Deputy Director, Operations.

Attachment C

JANUARY 14, 1972.

To: All State Directors (00-54).

Subject: Notice of Right to Personal Appearance and Appeal.

Inasmuch as the current printing of the Notice of Classification, SSS Form 110, does not include information concerning procedural rights, a "Notice of Right to Personal Appearance and Appeal" shall be attached to any such SSS Form 110 which is issued or mailed to a registrant as a result of a local board classification action.

A new version of the "Notice of Right to Personal Appearance and Appeal" is being printed. This version conforms to the revised Sections 1624 and 1626 published in the *Federal Register* on January 12, 1972, and will, upon receipt, supersede the notice described in our telegram of November 2, 1971. A supply of these new notices will be furnished to each state headquarters, and should be distributed to the local boards in the most expeditious manner.

These instructions are canceled upon receipt of SSS Form 110 with the procedural rights information printed thereon.

Effective February 1, 1972, and thereafter, all registrants will be informed of classification actions on the new SSS Form 110. All obsolete SSS Form 110's shall be destroyed.

DANIEL J. CRONIN,
Assistant Deputy Director, Operations.

Attachment D

NOVEMBER 2, 1971.

From: Washington, D.C., November 2, Director Selective Service System of Puerto Rico, 398 Fernandez Juncos Ave., San Juan P.R., via WUINY.

Classification actions by local boards shall be resumed immediately. The applicable provisions of LEM's No. 55 and 122 will still be applicable. No personal appearances shall be held until the new regulations become effective. Pending issuance of revised SSS Form 110, a notice containing the following language shall be attached to any SSS Form 110, as a supplement to information already contained therein, which is mailed to a registrant as a result of a local board classification action:

"Under proposed regulations, if you are classified or reclassified, you will be entitled to a personal appearance before your local board at which you may present up to three witnesses. You may also appeal to the appeal board.

and personally appear before the appeal board. If you wish to request an appeal and/or a personal appearance, notify your local board in writing within 30 days of the date shown on your SSS Form 110."

Appeal boards shall resume classification actions in any cases where the registrant's appeal period expired prior to September 28, 1971, but shall delay action in any cases where the registrant's appeal period expired on or after September 28, 1971. Where an appeal board classifies a registrant into class 1-A, 1-OA-0 or 1-O by less than a unanimous vote, the local board shall attach to the SSS Form 110 which is mailed to the registrant, a notice containing the following language:

"Under proposed regulations, you will be entitled to appeal to the national selective service appeal board, and personally appear before that board. If you wish to appeal and/or if you also wish to request a personal appearance, notify your local board in writing within 30 days of the date shown on your SSS Form 110."

CURTIS TARR,

Selective Service System, Washington, D.C.

Attachment E

LOCAL BOARD MEMORANDUM No. 111

Issued: August 11, 1970, as amended, April 23, 1971.

Subject: Reopening of Registrant's Classification.

1. In the exercise of authority under Selective Service Regulations Section 1625.2 with respect to claims that are made by registrants prior to the mailing of the Order to Report for Induction (SSS Form 252), the local board will be guided by the following language of the United States Supreme Court in *Mulloy v. United States* 398 U.S. 410, 416 (June 15, 1970):

Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his (local) Board and that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification, the Board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file.

The above quotation, it is believed, may fairly be interpreted as defining the kind of a case requiring reopening of a registrant's classification unless there is clear refutation contained in the file. Particular attention must be given to insure that local boards observe the "if true" qualification in acting either to reopen or deny a reopening of a classification.

2. Claims submitted by a registrant after the mailing of the Order to Report for Induction (SSS Form 252), will continue to be processed under the provisions of section 1625.2(b) of the regulations. Claims for classification in Class I-O or I-A-O received by the local board after the mailing of the Order to Report for Induction (SSS Form 252) may not be considered. Written information relevant to such claims shall be placed in the registrant's Cover Sheet (SSS Form 101).

CURTIS W. TARR,

Attachment F

APRIL 30, 1971.

Memorandum to all State Directors (GC-2).

Subject: Conscientious Objector Claims After the Order to Report for Induction.

Local Board Memorandum No. 111, revised April 23, 1971, in relevant part, provides:

Claims for classification in Class I-O or I-A-O received by the local board after the mailing of the Order to Report for Induction (SSS Form 252) may not be considered. Written information relevant to such claims shall be placed in the registrant's Cover Sheet (SSS Form 101).

Local boards should continue to implement the provision of section 1621.11 of Selective Service Regulations which reads:

The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of (the) Special Form for Conscientious Objector (SSS Form 150).

Executive Secretaries of local boards should inform registrants who make inquiries or who file the SSS Form 150 or other written representations with respect to claims for classification in Class I-O or I-A-O after the Order to Report for Induction (SSS Form 252) has been mailed that such claims cannot be considered by the Selective Service system but that such claims must be submitted to the armed force in which they are inducted.

WALTER H. MORSE,
General Counsel.

Attachment G

MAY 6, 1971.

Subject: SS No. 50.

DEAR MR. THOMSON: This will refer to your letter of May 3, 1971, and to our earlier correspondence.

In your letter, you mentioned specifically a letter issued from this headquarters to the State Director for Selective Service in New York, dated December 23, 1970, concerning subject registrant. We have reviewed this letter, along with the information provided in your letters, and have concluded that our letter of December 23, 1970 does not adequately or properly state the policy of this headquarters.

We believe that your point is well taken, and that this headquarters should not attempt to influence the decision made by any local board in a specific case as to whether or not a type of civilian work is appropriate. Certainly, the fact that the employer-organization is involved in peace activities should not be used as a basis for determining that other endeavors performed by the same organization are not in the National Health, Safety or Interest. Further, we fully realize that the era when draft counsellors were looked upon by disfavor by the Selective Service System is now past. Selective Service National Headquarters has undertaken an aggressive program to cooperate with draft information centers to the maximum extent possible. I am sure that you are aware that the administration of the Selective Service Law has taken a new direction during the past year and one-half. It is still our position, of course, that a Draft Counselling Service which participates in illegal activities (e.g., counselling registrants to wilfully violate the law) would not be in the National Health, Safety or Interest. However, from your letters, and from the reputation of your organization, it seems clear that your organization does not participate in such illegal activities.

All this is not to say that the final discretionary decision as to whether or not a particular job is "appropriate", can be made at any level in the System other than at the local board. The Selective Service Law clearly rests this final responsibility at that level. However, it is also clear that letters such as the one which emanated from this headquarters December 23, 1970, could exercise an undue influence upon a local board.

Accordingly, we are taking steps which we hope will have the effect of remedying any adverse reaction which may have been caused by our letter of December 23, 1970. We are furnishing a copy of this letter to the State Director for New York City, along with a letter addressed to him (copy attached) suggesting that, if he deems it appropriate, the matter be presented once more to subject registrant's local board. We trust that this procedure will allow his local board to consider the proposed employment on its merits without any influence from this headquarters.

We trust that our current position is clear. It is not the policy of this headquarters to look with disfavor upon the American Friends Service Committee as an employer in the Alternate Service Program.

We hope we have been of service to you.

Sincerely yours,

THOMAS S. FARRELL,
Colonel, AGC, State Director.

Attachment H

NOVEMBER 9, 1971.

To All State Directors (00-44).

Subject: Policy statement on deferment of ROTC members.

To assist the Selective Service System in continuing a uniform procedure in classifying registrants who are satisfactorily participating in an ROTC program, the following comments set forth our understanding with the Department of Defense:

(Local Board Memorandum No. 1, 45 and 104 relate to ROTC)

1. Four-year Program.

Upon enrollment into an ROTC program and after completion of an "ROTC Deferment Agreement" the responsible Professor of Military Science, Professor of Naval Science or Professor of Aerospace Studies will submit a DD Form 44 (Record of Military Status of Registrant) to the enrollee's selective service local board. Upon receipt of a DD Form 44, the registrant's local board shall place him in Class I-D, and retain him in this classification until reason for a change in his classification is a matter of record in his selective service file.

If a DD Form 44 is issued after a registrant has been issued an order to report for induction, he will be expected to report for induction under the guidelines provided for induction of other students.

2. Two-year Program.

Local Board Memorandum No. 104, as amended August 10, 1970, remains in effect. The local board memorandum provides for postponement of the date a registrant is to report for induction if he is under such an outstanding order providing the Professor of Military Science or Professor of Aerospace Studies furnishes a form letter during the spring term confirming the registrant's acceptance for training in an ROTC Basic Camp that following summer. If he is under an order to report for induction and an enrollment letter is received, he shall be issued SSS Form 264 (Postponement of Induction) and the reporting date postponed until October 31 of that year. If he is accepted for the summer basic camp and is later reached for induction, his local board will issue an SSS Form 252 (Order To Report For Induction) and postpone his date of induction until October 31, providing the appropriate form letter is in his selective service file.

If the registrant enters an Advanced ROTC Program that fall, the Professor of Military Science or Professor of Aerospace Studies will issue a DD Form 44 and upon its receipt, the registrant will be considered for Class I-D. If a DD Form 44 is not received by October 31, if the registrant drops from the basic camp, or if he fails to enroll in the fall course, his postponement shall be terminated at that time and he shall be placed on the local board's induction call when he is reached.

3. Registrants who have been awarded ROTC Scholarships but who have not yet enrolled in the ROTC Program will be issued their orders to report for induction, when reached, and then postponed until October 31 of that year. If a registrant is under an outstanding order to report for induction, he shall be postponed until October 31 of that year.

If the registrant enrolls in college and enters the ROTC Program on an ROTC Scholarship and a DD Form 44 is received, he will be considered for Class I-D. If a DD Form 44 is not received by October 31, his postponement shall be terminated at that time and he shall be placed on the local board's induction call, when reached.

DANIEL J. CRONIN,

Assistant Deputy Director Operations.

Attachment I

ADMINISTRATIVE BULLETIN NO. 765.1

Issued: January 1, 1972.

Subject: Selective Service System Publications—Media and Numbering.

PART I—OFFICIAL ISSUANCES

1. *Introduction.*—This Administrative Bulletin rescinds Headquarters Order No. 5, issued July 26, 1948, amended July 17, 1970. All discontinued extant issuances will remain valid until rescinded or superseded.

2. *General.*—Official Selective Service System issuances governing the control and operation of the National Selective Service System shall be confined to those publications described below. Except as provided in subsection a, all manuals, bulletins and orders or parts thereof will be published in the Federal Register when required by section 3 of the Administrative Procedure Act.

a. *Selective Service Regulations.*—implement the provisions of Public Law and govern functions of the Selective Service System and have general applicability and legal effect. They will be issued by the Director pursuant to authority contained in Executive Orders 9979 and 11623 and section 6(j) of the Military Selective Service Act, and will be published in the Federal Register in accordance with section 13(b) of the Military Selective Service Act.

b. *Selective Service Manuals.*—promulgate doctrine, policy, techniques and procedures. They contain instructional, informational and reference material relative to Selective Service administration, training and operations. Selective Service Manuals are issued by the Director.

(1) *Registrants Processing Manual.*—defines agency doctrine and contains operational procedures of a continuing nature involved with the processing of registrants. It has *general applicability and legal effect*. It consists of three sections, (a) Text, (b) Operational forms including procedural directives and (c) an appendix consisting of operational instructions of a temporary nature.

(2) *Manpower Administration Policy and Procedures Manual.*—sets forth the regulatory, policy and procedural requirements for (a) the preparation and implementation of plans for the control and utilization of manpower resources; (b) the development of personnel policies and personnel procedures, including positive action programs to promote equal employment opportunity for minority groups and for women; (c) supervising the application of personnel policies and personnel plans in the management of all personnel of the Selective Service System; (d) the preparation and implementation of plans required to meet the training needs of the Selective Service System, including the management of the military reserve program.

(3) *The Fiscal and Procurement Manual.*—furnishes the essential directives, instructions and procedures pertaining to fiscal and procurement functions.

(4) *Training Manuals.*—contains instructional, informational and reference material relative to training of all elements throughout the system.

(5) *The Administrative Forms Reference Manual.*—provides (a) Procedural Directives, (b) Flow Charts, and (c) facsimiles of administrative forms prescribed by the Director and selected forms of other agencies which relate to Selective Service. This manual will be used primarily as a reference manual and will be maintained by the Manager, Administrative Services Division.

c. *Selective Service Bulletins.*—disseminate instructions of a permanent or semipermanent nature requiring prompt and continuing action and/or disseminate information pertaining to matters of current interest.

(1) *Administrative Bulletins.*—will be issued by the Director and contain general administrative and records management instructions.

(2) *Inspection Services Bulletin.*—contain informative items and messages of general interest and will be issued by the Assistant Deputy Director for Operations.

(3) *Data Processing Bulletins.*—disseminate technical information and guidance relative to data processing and will be issued by the Assistant Deputy Director for Administration.

d. *Letters to All State Directors.*—provide information or instructions of a transitory and temporary nature and will be issued by the Director.

e. *Letter Orders.*—will be issued by the Director and announce the changes in key personnel assignments at State Headquarters and Service Centers.

f. *Presidential Appointment Orders.*—will be issued by the Director and announce administrative actions concerning uncompensated personnel appointed by the President.

g. *Director Appointment Orders.*—will be issued by the Director and announce administrative actions concerning uncompensated personnel appointed by the Director.

3. *National Headquarters.*—Orders and Memoranda for the guidance of National Headquarters, follow:

a. *Headquarters Orders.*—apply to the operation of National Headquarters and will be issued by the Director.

b. *Memoranda to Staff and Division Chiefs*.—constitute a media of communication to members of the Director's Staff and Division Chiefs and will be issued by the Director.

c. *Memoranda to All Personnel*.—supply information or instructions to all employees and will be issued by the Director.

PART II—NUMBERING SYSTEM

1. *General*.—A numbering system for the classification of subject matter will be used throughout these publications. The numbering system as described and illustrated below will be standardized and used to classify documents and the content thereof.

<i>Series</i>	<i>Title</i>
000.	Indexes, general
010.	Index to Public Information Issuances
015.	Index to Legislative and Liaison Issuances
020.	Index to General Counsel Issuances
030.	Index to Comptroller Issuances
040.	Index to Plans and Analysis Issuances
045.	Index to Inspection Services Issuances
050.	Index to Manpower Administration Issuances
060.	Index to Operations Issuances
070.	Index to Administration Services Issuances
080.	Index to Automated Data Processing Issuances
100.	Public Information, general
115.	Publications, Public Information
120.	News Releases
125.	Public Relations
130.	Protocol
150.	Legislation and Liaison, general
160.	Legislation pertaining to Selective Service
180.	Relations with Congress and its Members
200.	Legal, general
220.	Selective Service Act
240.	Selective Service Regulations
260.	Regional Field Attorneys
280.	Court Proceedings
300.	Comptroller, general
305.	Fiscal and Procurement Manual
310.	Pay and Related Subjects
330.	Travel
340.	Transportation of Things
360.	Vouchering and Scheduling
380.	Accounting Records and Procedures
390.	Service Centers, general
400.	Plans and Analysis, general
410.	Conferences
430.	Research and Studies
440.	Contingency Planning
450.	Inspection Services, general
455.	Inspection Services Bulletins
500.	Manpower Administration, general
505.	Manpower Administration Policy and Procedures Manual
510.	Personnel, general
520.	Uncompensated Personnel
540.	Compensated Personnel
550.	Military Personnel
560.	Training
570.	Equal Employment Opportunity
580.	Organization and Staffing
600.	Registrant's Processing Manual
602.	Definitions
603.	Local Board Procedures
606.	General Administration
611.	Responsibility and Duty to Register
613.	Registration Procedures

<i>Series</i>	<i>Title</i>
619.	Termination of Accountability
621.	Preparation for Classification
622.	Classification Rules and Principles
623.	Classification Procedures
624.	Appearance before Local Board
625.	Reopening Registrant's Classification
626.	Appeal to Appeal Board
627.	Appeal to the President
628.	Physical Examination
630.	Volunteers
631.	Selection
632.	Delivery and Induction
655.	Processing of Registrants Residing in Foreign Countries
660.	Alternate Service in Lieu of Induction
695.	Reports
700.	Administrative Services, general
705.	Communications, general
710.	Administrative Records
720.	Forms
725.	Administrative Form Reference Manual
730.	Procurement
740.	Property Management
750.	Space Allocation and Utilization
760.	Printing and Duplicating
765.	Publications
780.	Motor Vehicles
790.	Mail and Distribution
800.	Automated Data Processing, general
805.	Data Processing Bulletins

2. Consecutive Numbering

2.1 Publications, for which entering a number indicating sequence by calendar year is prescribed herein, will be numbered with the calendar year designation following the sequence number.

Example: Headquarters Order No. 172

2.2 Sequence numbers on publications for which entering a subnumber indicating sequence of issuance is prescribed herein, will follow preceding numerical designations.

Example: Administrative Bulletin No. 650.1

2.3 The Reports and Document Control Manager will maintain a control ledger and will enter all sequence numbers on publications requiring sequential identification.

3. Selective Service Regulations (SSR)

3.1 *Numbering.* Selective Service Regulations are numbered by the General Counsel within the series of numbers assigned to the Selective Service System in the Code of Federal Regulations by the National Archives and Records Service.

4. Registrants Processing Manual (SSRPM)

4.1 *Numbering.* The Selective Service Registrants Processing Manual will be identified with the subject number 600. Separate chapters or parts will be assigned appropriate individual subject numbers.

5. Selective Service Manpower Administration Policy and Procedures Manual (SSMAP)

5.1 *Numbering.* The Selective Service Manpower Administration Policy and Procedures Manual will be identified with the subject number 505. Separate chapters, sections or parts may be assigned appropriate individual subject numbers.

6. Selective Service Fiscal and Procurement Manual (SSFPM)

6.1 *Numbering.* Each chapter of the Selective Service Fiscal and Procurement Manual is numbered according to classification of subject matter (par. 1) and a subnumber indicating sequence of issue (par. 2.2).

Example: Chapter 3, 330.1, Travel.

7. Selective Service Training Manuals (SSTM)

7.1 *Numbering.* Training Manuals are each assigned a basic number indicating the subject matter (par. 1) and a subnumber indicating sequence of issue (par. 2.2).

Example: Training Manual No. 623.1 Classification Procedures

8. *Selective Service Administrative Forms Reference Manual (SSAFM)*

8.1 *Numbering.* Each form in the Selective Service Administrative Forms Reference Manuals will be appropriately numbered. The manual will not be numbered.

9. *Selective Service Administrative Bulletins (SSAB)*

9.1 *Numbering.* Selective Service Administrative Bulletins are numbered according to classification of subject matter (par. 1) and a subnumber indicating sequence of issue (par. 2.2).

Example: Administrative Bulletin No. 780.1

10. *Selective Service Inspection Services Bulletins (SSIB)*

10.1 *Numbering.* Selective Service Inspection Services Bulletins are assigned number 455 followed by a sequence number.

Example: Inspection Services Bulletin No. 455.1

11. *Selective Service Data Processing Bulletins (SSDPB)*

11.1 *Numbering.* Selective Service System Data Processing Bulletins are assigned number 805 followed by a sequence number.

Example: Data Processing Bulletin No. 805.1

12. *Selective Service Letters to All State Directors (SSLSD)*

12.1 *Numbering.* Selective Service Letters to All State Directors are numbered according to classification of subject matter (par. 1) and a subnumber indicating sequence of issue (par. 2.2).

Example: Letter to All State Directors No. 760.1

13. *Selective Service Letter Orders (SSLO)*

13.1 *Numbering.* Letter Orders are numbered consecutively by calendar year (par. 2.1).

14. *Selective Service Presidential Appointment Orders (SSPAO)*

14. *Numbering.* Presidential Appointment Orders are numbered consecutively by calendar year (par. 2.1).

15. *Selective Service Director Appointment Orders (SSDAO)*

15.1 *Numbering.* Director Appointment Orders are numbered consecutively by calendar year (par. 2.1).

16. *Selective Service Headquarters Orders (SSHO)*

16.1 *Numbering.* Selective Service Headquarters Orders are numbered consecutively by calendar year (par. 2.1).

17. *Selective Service Memoranda to Staff Officers and Division Managers (SSMSD)*

17.1 *Numbering.* Selective Service Memoranda to Staff and Division Managers are numbered consecutively by calendar year (par. 2.1).

18. *Selective Service Memoranda to All Personnel (SSMAP)*

18.1 *Numbering.* Selective Service Memoranda to All Personnel are not numbered and should be destroyed when each purpose has been served.

PART III—REVISIONS AND RESCISSIONS

1. *General.*—Issuances announced in this bulletin may be revised and rescinded as described and illustrated below.

a. *Revisions.*—A revision is a rewrite and reissue of an existing publication that supersedes itself. The revised document bears a new date, and carries the same number as the original document; however, the number is followed by a revised sequence number.

Example: Letter to All State Directors No. 605.1 upon first revision becomes Letter to All State Directors No. 605.1.1.

The revised publication bears a new date and includes a supersession footnote on the title page.

Example: Supersedes SSLSD No. 605.1, 7/9/72

b. *Rescissions.*—A rescission is the cancellation of a publication by the office which had originated the document. It carries the same number as the original document followed by a revision sequence number. The rescinding message will refer to the number of the latest printing of the document and the effective date of rescission.

Example: "SSLSD No. 605.1, July 9, 1972 is rescinded effective December 1, 1972."

BYRON V. PEPITONE,
Deputy Director.

Attachment J

SUBJECT INDEX TO MAJOR NATIONAL DIRECTIVES OF THE SELECTIVE SERVICE SYSTEM IN EFFECT ON JANUARY 1, 1972

AMERICAN FRIENDS SERVICE COMMITTEE,
15 Rutherford Place, New York, N.Y.

(By Yaakov Ibn Ezra (Jack Engel Shattuck), Draft Counseling Coordinator, AFSC)

Description:	Cited herein as—
(1) Local board memoranda-----	For example, LBM (105).
(2) Letters to all State directors (Operations Division Series).	For example, LASD (00-43).
(3) Memoranda to all State directors (Office of the General Counsel).	For example, MASD (GC-7)
(4) Operations Bulletin No. 338, June 18, 1970-----	(Ops. Bull. 338)
(5) Letter to all college registrars, Sept. 3, 1971-----	(College letter.)
(6) Personal letter to all State directors, Oct. 1, 1971--	(PLASD).
(7) Telegram to all State directors, October 1971-----	(October TASD).
(8) Telegram to all State directors, Nov. 2, 1971-----	(November TASD).

(1) LBMs are available by subscription, \$4 prepaid to the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Writers should request Catalogue Number Y 3 Se 4:13-2/ and should receive in return all current LBMs to date. Changes will be mailed after issuance.

(2, 3) LASDs and MASDs "will be supplied to the large draft counseling publications, including SSLR, who can publish pertinent materials" whereas "it will not be possible to furnish copies of items . . . to individual counselors" because of the numbers which are involved. (SSS Office of Public Information, *Counselors' Newsletter*, 12/30/70—1/31/71)

The *Counselors' Newsletter* is a descriptive list of directives, 'tho not an index required by the Administrative Procedure Act (APA, or "Freedom of Information Act"), Section 3(a)(2), 5 U.S.C. 552(a)(2). Readers may subscribe to the list without cost by writing to: Educational Programs Officer, SSS Public Information Office, 1724 F St. N.W., Washington, D.C. 20435. It is issued monthly.

(4) OPS. BULL. 338 may be inspected at the office of any local board, State Director or National Headquarters of Selective Service. 32 C.F.R. [Regulation] 1606.57 (d).

(5-8) Other letters and telegrams specified above are found in the *Selective Service Law Reporter*. SSLR (Lib. of Congress No. 68-28669), at pages 2200:81 and 2200:86 f.

All of the cited items (1-8) *should* be available for inspection and copying at offices of local boards or State and National Headquarters of Selective Service, although the degrees of cooperation may vary. *Tuchinsky v. Selective Service System*, 418 F.2d 155, 2 SSLR 3359 (7th Cir. 1969). Otherwise, see generally pages SSLR 2157 ff. for items covered by this index.

Subscriptions are available from SSLR, 1346 Connecticut Avenue N.W., Dupont Circle Building, Suite 610, Washington, D.C. 20036, at a variety of rates.

AFSC would appreciate receiving your comments concerning this SSS DIRECTIVES INDEX.

Users are invited to reprint or otherwise utilize this index as befits such needs.

EFFECTIVE DATE OF INDEXED MATERIALS

(1) Local board memoranda and (4) OPS. BULL. 338 generally remain in effect, as issued or amended until rescinded. Rescission dates are listed below.

(2, 3) LASDs and MASDs more frequently supersede *in toto* similar earlier issuances on the same topic, or may continue earlier directives in effect while providing additional information on a subject. Rescinded items are listed below.

(5-8) Other letters and telegrams remain effective insofar as they meet the purpose for which they were expressly issued.

Selective Service Regulations (32 C.F.R. 160 *et seq.*) would usually take precedence over these materials, but contradictions occasionally occur. For instance, Cf. Regulation 1631.6 v. LBM 99 v. LASD (00-51), on Order of Call.

RESCISSION DATES OF LBM'S

3. Oct. 12, 1951	28. Aug. 31, 1961	60. Mar. 1, 1962
4. Oct. 27, 1948	29. Jan. 6, 1956	62. June 14, 1971
5. Aug. 31, 1961	33. June 22, 1970	69. June 14, 1971
6. Oct. 12, 1951	34. Feb. 29, 1952	74. June 22, 1970
7. (Pre-April, 1954)	35. Dec. 29, 1961	75. June 22, 1970
8. Mar. 1, 1956	36. Dec. 29, 1961	81. Apr. 19, 1958
9. Aug. 31, 1961	37. Dec. 29, 1961	82. Nov. 2, 1970
10. Dec. 29, 1961	39. Mar. 1, 1956	83. Nov. 10, 1971
11. Dec. 29, 1961	40. Jan. 31, 1954	84. Nov. 10, 1971
12. Nov. 6, 1950	41. Aug. 27, 1970	87. Nov. 10, 1971
13. June 22, 1970	42. Aug. 31, 1953	88. Apr. 23, 1970
15. Oct. 12, 1951	46. Jun. 15, 1962	92. Nov. 10, 1971
18. Nov. 21, 1951	47. Jan. 6, 1956	95. Nov. 10, 1971
19. Oct. 12, 1951	48. Feb. 19, 1965	96. June 22, 1970
20. July 23, 1954	49. Dec. 29, 1961	100. Sept. 26, 1970
21. Aug. 31, 1961	50. Jan. 6, 1956	108. Sept. 26, 1970
22. Oct. 23, 1967	51. Aug. 31, 1961	110. Nov. 27, 1970
24. Mar. 2, 1953	53. Feb. 24, 1966	117. Nov. 3, 1971
25. May 6, 1954	54. Feb. 19, 1965	118. Sept. 8, 1971
26. Oct. 12, 1951	58. Aug. 23, 1957	122. Dec. 10, 1971

RESCISSION DATES OF LASD'S

00-2 Nov. 10, 1970	00-11 Nov. 10, 1971	00-26 June 25, 1971
00-6 Dec. 8, 1970	00-13 1971	00-27 Oct. 5, 1971
00-9 July 16, 1971	00-15 1971	00-49 Jan. 1972

Following references to PL 92-129 are to the Draft Extension Act which was signed into law on September 28, 1971 (85 Stat. 348).

Section 101(a) (32) of PL 92-129 contains the following provision, amending the Military Selective Service Act:

... no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given the opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation.

None of the following indexed items were published in the Federal Register before being put into effect by the Selective Service System.

EXEMPT FROM REGISTRATION

Aliens (16) (118); Students at military colleges (45); Other military status affecting non-registration (45) (70) (90)

REGISTRANTS OUTSIDE CONTINENTAL UNITED STATES

General procedures (73); Local board 100 (73); Transfer to another board from local board 100 (73); Alaskan residents (59); Cuban residents (73); Postponement of physicals/induction (116); AFEES processing in accord with LBM 116 (00-32); Physicals/induction processing/1-W work outside the United States (73)

CLASSIFICATIONS

1-A: AVAILABLE FOR MILITARY

Reconsidering classification/reopening for lottery exposure (99); Affected by revised mental standards of 1/1/72 (00-52); Reordering to physical after failure to report/submit following *Gutknecht v. U.S.* (106); 30-day notice of induction (PLASD) See also: Priority Processing & Order of Call, See also: Doctors and Allied Specialists

1-A-O, 1-O, 1-W: CONSCIENTIOUS OBJECTORS

Criteria for Conscientious Objection (107); Non-combatant service defined (32); Affected by revised mental standards of 1/1/72 (00-52); Delinquency at physical (14) (64) (106); Volunteer for civilian work (64) (Oct. TASD); Postponement of work order (64); Extended Priority and Order of Call for 1-O (00-51); 30-day notice for induction of 1-A-O (PLASD); 30-day notice, retroactive credit for 1-W work (Oct. TASD); Appropriate work (98); Civilian work in another state (102); Overseas work (73); Reopening (111); Post-induction-order claims (111) (GC-2); Court procedure (103); Prosecution determined by Regional Attorney (GC-6); Records of COs in World War II (61); Classification not extension of liability (38) See also: Priority Processing & Order of Call, See also: Doctors and Allied Specialists

1-C: ACTIVE MILITARY (& STUDENTS), NATL. OCEANIC & ATMOSPHERIC ADMINISTRATION [NOAA], PUBLIC HEALTH SERVICE, BUREAU OF PRISONS

When exempt from registration (70); Public Health registration (90); Postpone/cancel the physical/induction after 6 years in the military (66); 6 years status/over 26 completes liability (00-29); Enlistment when ordered for induction (00-14); Ranks in the Armed Forces—Attachment to LBM (80); Classification not extension of liability (38) See also: Doctors and Allied Specialists

1-D: NATIONAL GUARD, RESERVES, ROTC

When exempt from registration (45) (70); When liability extended (38) (67); Notification of status to local board (1) (104); Policy statement on ROTC members (00-44); Reserve branches identified (66); Students at military colleges (45); Doctors and allied specialists (77) (90) (00-19); Clergy (79); Availability for active service (79) (00-47); Class 1-R for "dual" status (79); Class 2-R for critical occupation (79); Procedures to notice availability (80); Procedures to report enlistments (93); Unsatisfactory performance and priority induction (63) (00-47); Postpone/cancel the physical/induction after 6 years in the military (66); Postpone induction for ROTC Summer Camp (104); Induction beyond age 26 (67)

1-S(C): COLLEGE STUDENT AFTER RECEIPT OF INDUCTION NOTICE

Extends liability (38) (67); Not applicable to 1-O (64); Reopening and reconsidering for lottery exposure (99)

2-A: ESSENTIAL (NON-AGRICULTURE) ACTIVITIES & CERTAIN STUDENTS

Extends liability (38) (67); Late information from school affecting student placement in Extended Priority (00-48); State Advisory Committee findings for non-medical 2-As (00-37); Grad school teaching (96); Reservist Class 2-R (79); Availability after April 22, 1970 (Ops. Bull. 338); Inappropriate for 1-W work (98); Reconsidering/reopening for lottery exposure (99); Induction postponement for non-degree study (112); Induction postponement with essential job phase-outs (Ops. Bull. 338); Student and teacher induction postponement following PL 92-129 passage (PLASD) See also: Doctors and Allied Specialists

2-C: ESSENTIAL AGRICULTURE ACTIVITIES

Extends liability (38) (67); Availability after April 22, 1970 (105); Reconsidering/reopening for lottery exposure (99)

2-D: STUDENTS (PRE-)ENROLLED FOR MINISTERIAL STUDIES

Reconsidering/reopening for lottery exposure (99)

2-S: COLLEGE STUDENTS GENERALLY

Extends liability (38) (67); General definition—credit loss (43); 1971-72 Freshman Form 109 withheld at SSS request (College letter); Late information from school affecting placement in Extended Priority (00-48); Grad school teaching (96); Graduating student with special exam to practice specialty (44); Military colleges (45); Reconsidering/reopening for lottery exposure

(99) ; Induction postponed during school year, generally (112) ; Induction postponement following PL 92-129 passage (PLASD)

3-A: PATERNITY AND HARDSHIP DEFERMENT

When liability extended (38) (67) ; Paternity deferment not available to doctors (77) ; Cooperation between SSS and the Red Cross (27) ; Armed Forces dependency allotment (17) ; Availability after April 22, 1970 (105) (Ops. Bull. 338) ; Reconsidering/reopening for lottery exposure (99)

4-A: COMPLETED MILITARY OBLIGATION

When exempt from registration (70) ; Physical/induction for special registrants (Doctors and allied specialists) (77) ; 6 years' military status/over 26 completes liability (00-29) ; Cooperation between SSS and Veterans Administration (86) ; Classification not extension of liability (38)

4-C: ALIENS

When exempt from registration (16) (118) ; When exempt from Armed Forces service (16) (23) (76) ; Illegal entry and deportation—Immigration and Naturalization offices (31) ; Classification not extension of liability (38)

4-D: CLERGY

Definition (56) ; Interrupting undergrad study (43) ; Reservists (79) ; Classification not extension of liability (38)

4-F: UNFIT UNDER PHYSICAL/MENTAL/ADMINISTRATIVE STANDARDS

When liability extended (38) (67) ; Procedures for special registrants (Doctors and allied specialists) (77) ; Qualifications—when local board decides (65) ; Obvious disqualifications (78) ; Medical interview discretionary (113) ; Transfers of physicals (116) ; Economical/efficient delivery to AFEES (00-33) ; Billeting and feeding AFEES subjects (00-3) (00-7) ; Overseas registrants (73) ; Disqualified registrants able to volunteer (89) ; Mental standards (94) (00-52) ; Reordering physical after failure to report/submit following *Gutknecht v. US* (106) ; Submission of new evidence (121) ; 3-day AFEES exam (109) ; Contact lenses not used at physical (109) ; Medical Reevaluation and Review System, USAREC appeal of findings (121)

OVERAGE OF LIABILITY

Doctors and allied specialists (77) ; Turning 26 without extended liability (99) ; Status not an extension of liability (38)

EXTENDED LIABILITY

What constitutes deferment and extension of liability (38) (67) ; Inapplicable when never liable (38) ; Effect of student deferment under PL 92-129 (College letter) ; Induction over 26 (38) (67) (99)

PRIORITY PROCESSING AND ORDER OF CALL

Delinquency processing ended (101) ; Random Sequence Numbers (RSNs), lottery procedures generally, definitions of Priority Groups (99) ; RSNs placed on various forms (00-5) ; Board 100 registrants (73) ; Class 1 registrants generally (74) (90) (99) (120) ; 1-0 registrants particularly (00-51) ; Doctors and allied specialists (77) ; Unsatisfactory Reservists (63) ; Miscellaneous priorities for physicals in 1971 (00-4) (00-17) (00-21) (PLASD) ; Physicals upon registrant request (105) ; Physicals for those ending deferments (120) ; Suspense file kept for expiring classifications (124) ; Reconsidering/reopening for lottery exposure (99) ; Processing by RSN order not prejudicial to Priority Group assignment—Attachment to LBM (55) ; Priority in appeals (114) ; Late information from school affecting placement in Extended Priority (00-48) ; Notification of Extended Priority status (00-50) ; Uniform National Call starting 1/1/72 (00-42) (PLASD) ; 30-day notice of induction (PLASD) ; 30-day notice of work order (Oct. TASD)

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Delinquency punitive processing ended (101); Local board and AFEES procedures (14); Fictitious registrant (57); Registrant with Board 100 (73); When is 1-0 delinquent (64); Reordering physical after refusal to report/submit following *Gutknecht v. U.S.* (106); Destruction of SSS cards (85)

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When exempt from registration (70); Extension of liability (38) (67); General processing procedures (77); Priority in processing (77); Miscellaneous reports on progress in meeting Special Call No. 46 [1971-72 Doctors' draft] (00-8) (00-19) (00-20) (00-22) (00-23) (00-31) (00-35) (PLASD); General limit on inductions pending Department of Defense needs (91); National Security Council advice, community essentiality by Feb. 25, 1971 (00-23); Conscientious Objectors (77); Class 1-C (77) (90); Class 1-D (90); Class 2-A (77) (90) (00-23); Class 4-A (77); Class 4-F (38) (77); Overage (77); Public Health Service (38) (70) (90) (00-8); Berry Plan [military residency] (77); Pharmacy interns (44); Professional students (112); Separate file maintained (77); Induction over 26 (67)

REGISTRANTS' PROCEDURAL RIGHTS

Transfer to another board from local board 100 (73); Timely filing refers to postmark (72); Personal appearance, generally (52); Tape recorders prohibited at appearance (00-43); Advisors to Registrants (00-10) (GC-5) (GC-10); Government Appeal Agents phased out (00-45); Medical interview (78) (113); Medical appeal (121); State Director appeal (68); Priority in appeals (114); Processing by RSN order not prejudicial to Priority Group assignment—Attachment to LBM (55); Reconsidering/reopening for lottery exposure (99); Reopening criteria (111); Procedures following PL 92-129 passage (00-34) (PLASD) (Nov. TASD).

POSTPONEMENT/CANCELLATION OF PHYSICALS/ORDERS TO REPORT

As affects Priority Group assignment (99); Identified on Delivery/Transfer lists (00-5); At distant AFEES generally (116) (00-32); Conscientious Objectors (84); Students (64) (112) (PLASD); Review for revised mental standards of 1/1/72 (00-52); Pending exams for license (44); Hard-to-replace employees (Ops. Bull. 338); Peace Corps (105); Public Health Service CORD Program participant (00-8); Doctors' draft [Special Call No. 46] for 1971-72 (00-20) (00-21) (00-23) (00-32); Medical personnel pending Department of Defense needs, normally (91); ROTC Summer Camp (104); After 6 years in the military (66); Religious observance of holidays (2); Following PL 92-129 passage (PLASD)

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Registrant Information Bank (RIB) reports on Form 112-A (00-16) (00-18); National Uniform Filing System (124); List of registrants—availability of records (71); Access and copying (97); Access to recruiters (93); Medical report of enlistees (93); Standby Reserve forms (80); Records of World Wars I and II (61)

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This index was compiled in January, 1972. Changes are frequent. Many of the above items will be included in a new "Registrant Processing Manual" being prepared by the Selective Service System, to be sold through the United States Government Printing Office at such time as the new "R P M" is completed.

ADDENDUM

Unpublished Policy Directive on Men Classified I-Y and Men with Armed Forces Physical Reexamination Believed Justified (RBJ)

On November 24, 1971, a verified copy of a Telegram to All State Directors was received at the various State Headquarters. The full text of that Telegram has not yet been made available (although sent as "unclassified"), and does not appear in the Selective Service Law Reporter. ALL OTHER ITEMS IN THIS SSS DIRECTIVES INDEX ARE IN SSLR, PAGES 2157 ff. This Telegram is not cited in the Index.

A portion of the Telegram is reprinted below. The Section in brackets which then follows is the continuation of that text, as paraphrased or extrapolated from Several State Headquarters' Memoranda. In several, if not all, States an explanatory letter is sent to registrants explaining this policy.

FM C W Tarr Director Selective Service System Headquarters Washington D.C.
Unclas it is expected that the new regulations will become effective on December 10, 1971.

Registrants examined and found unacceptable (with reexamination believed justified) at Armed Forces physical examination prior to that date shall be classified in Class I-Y if classification action is taken by December 10, 1971. If the local board meets to classify any such registrant after December 10, 1971, his classification shall be reopened and he shall be placed in class I-A.

Registrants examined and found unacceptable with no reexamination recommended shall be set aside until after the effective date of the new regulations at which time they shall be considered for classification in Class 4-F.

[For those examined after December 10, 1971, whose reexamination is believed justified, Classification of I-A shall be retained until such persons are returned for reexamination. After that "final determination", if a registrant is at that time found acceptable, he may be processed for induction when his Random Sequence Number is reached and after the proper notice is given.

If a registrant is again found unacceptable for induction, he will be placed in Class 4 F by the local board at its next meeting regardless of whether or not the AFES states that a reexamination is believed justified.]

Attachment K

SEPTEMBER 3, 1970.

To: All State Directors.

Subject: Re-examination of Registrants.

Increasingly large numbers of registrants who have been found not acceptable on preinduction examination are being returned to Armed Forces Examining and Entrance Stations (AFES) on the basis of recommendations by AFES. An uneconomical percent of the re-examinees is found acceptable.

Registrants who have been found unacceptable by AFES with "re-examination believed justified" on DD Form 62 (Notice of Acceptability) shall be considered for reclassification in Class I-Y *immediately* after receipt of DD Form 62. The recommended time interval before re-examination specified by AFES shall have no influence upon consideration of such registrants for classification in Class I-Y.

State Directors shall determine when, if ever, to return any registrant for re-examination based on operational considerations: i.e., availability of funds, probability of acceptance, and workload of the local board.

In any event, a registrant may be returned for re-examination no more than one time. Any registrant who has been returned for re-examination and has again been found unacceptable, shall be continued in Class I-Y, or if in Class I-A at the time of re-examination, shall be reclassified to Class I-Y, or such lower classification for which he may qualify.

For the Director.

DEE INGOLD.

Acting Assistant Deputy Director, Operations.

STATEMENT OF JOSEPH TUCHINSKY, MIDWEST COMMITTEE FOR DRAFT COUNSELING

Mr. TUCHINSKY. My interest in the workings of the Selective Service System and my qualifications to offer information to you today are evidenced by the fact that I have been a registrant with that System since 1955—

Senator KENNEDY. I have the statement here. I would like you to summarize it.

Mr. TUCHINSKY. Let me recap it then and ask that it be included in the record.

I want to list then under two headings some of the most serious abuses which seem to be occurring in the System at this time. First, under the heading of conflicts with statutory and other authority, the regulations enacted and proposed by the System seem to have the effect of emasculating a number of reforms enacted by the Congress in the last session.

In my prepared statement I list a number of them. I am additionally concerned about what Dr. Tarr told us this morning: that advisers to registrants will now council men and solicit their confidences, and then go onto local boards to judge these same cases and influence the other members. This seems to me to create a worse conflict of interest than the Government appeal agents ever did.

I am also concerned that State directives seem to be unsupervised by the national headquarters, that in some cases there seems to be 56 State and territorial fiefdoms in the Selective Service System. We find such abuses as the case of an Ohio directive which says that one must give up his conscientious objective claim or lose the right to give up a draft deferment and be exposed to a draft lottery in a year in which his number is not reached.

We find that there are directives coming from National Selective Service totally lacking in statutory authority. A conspicuous example is a national directive forbidding men to bring tape recorders into their hearings even though they must later write an accurate summary of those hearings for the record if they presented new information.

I am concerned also, Mr. Chairman, about abuses that have occurred during the transitional period beginning before the new statute was enacted and continuing to the present time. The on-again-off-again appeal process has had the net effect of causing a number of men to lose the right to personal appearances before the board which Congress provided, in those instances where cases were pending at the time the act was signed.

Second, the failure to send questionnaires out to registrants, to determine which men were eligible for exemptions as aliens and surviving sons, exemptions newly created by the Congress in the 1971 statute. Those men were never notified of their right and were never offered the opportunity to present new evidence. Inductions were resumed in November, and it is entirely likely that some of those men legally exemptable may have been illegally inducted in November and December. And since the questionnaires still have yet to go out, when inductions are next resumed, those men may still

be ignorant of their right and be drafted without ever having the opportunity to file a claim.

What I think this adds up to, Mr. Chairman, is that the rights of registrants can only be harmed by this policy. It does not even serve the narrow interests of the selective service bureaucracy. Many young men, especially those less educated, may illegally be inducted by their draft boards, but many others may challenge these policies and the Selective Service System may continue for a long time, as last fall, to be tied down by litigation and court injunctions in many parts of the country, if it continues to enforce policies contemptuous of the law and basic fairness.

I do not place great hope in draft law reform. I oppose any military draft as a violation of American ideals of personal freedom, an anachronistic survival of slavery in which young men are forced to work at low wages under pain of imprisonment or exile an infusion of dangerous militarism, and a grant of power to the military establishment which it has proven itself in recent years unqualified to process. However, while there is a draft law on the books and a Selective Service to administer it, I believe that every procedural right and every freedom of choice which the statute or constitutional due process create for registrants must be protected from encroachment due to bureaucratic power hunger or laziness disguised as efficiency, either of which will gladly substitute arbitrary fiats for freedom of choice.

My claims are explained in detail in the written statement I have submitted for the record and confirmed by exhibits attached to that statement.

I would be glad to try to respond to any questions.

Mr. Chairman, members, and staff of the subcommittee, my interest in the workings of the Selective Service System and my qualifications to offer information to you today are evidenced by the facts that I have been a registrant with that System since 1955, an active draft counselor since 1962, the coauthor, with Arlo Tatum, of the successive editions since 1968 of Guide to the Draft, the most widely read general handbook on the workings of the draft law, and also since 1968 the founder and a full-time staff member of the Midwest Committee for Draft Counseling, one of four offices of CCCO, the largest and one of the most respected national agencies helping to make available accurate information and reliable, honest counseling to those affected by the draft.

In the written statement I have submitted to the subcommittee I have offered details of a number of instances of recent official abuses by the Selective Service System. I have confined myself to two related types of abuses—first, instances in which regulations and other directives issued by the Selective Service System in recent months violate the letter or intent of the act passed by Congress, or assert powers not created by that act or any other; and second, actions of the Selective Service System during the transitional period before and after passage of the 1971 act which had the effect of denying registrants the rights which Congress, or the System's own existing regulations, conferred.

Let me merely summarize these now.

Under the heading of conflicts with statutory and other authorities, first, regulations enacted and proposed by the Selective Service System have the effect of emasculating the statutory reforms aimed at providing fair hearings for the young men registered with the System. By reducing the period to apply for an appeal from 30 or 60 days down to 15, and by limiting hearings to 15 minutes including the time for testimony by up to three witnesses, these hearings may become unavailable or meaningless to many men. The statutory requirement that reasons be provided if men's claims are denied is evaded with reasons which are mere conclusions, not facts related to individual cases, and the System has sanctioned use of checklists and boilerplate forms in lieu of meaningful reasons. I am concerned that Dr. Tarr told us this morning that advisers to registrants will counsel with young men, solicit their confidence, then go onto local boards to judge these same cases and influence the other members; this creates a worse conflict of interests than the Government appeal agent ever did.

Second, unpublished Selective Service directives undercut whatever fairness is in the official regulations, as in the case of a complex and important registration questionnaire which the regulations say should be mailed to the man to be returned within 10 days, but a registrants processing manual and State directives say it must be filled out on the spot with no one but the local board clerk as a legal advisor.

Third, State directives often deny rights created by national policies, as in the case of an Ohio directive which says one must give up his conscientious objector claim or lose the right to drop a deferment and be exposed to the draft lottery in a year in which one's number is not reached.

Fourth, there are directives totally lacking statutory authority, as in the case of a national directive forbidding men to bring tape recorders into their hearings, though they must later write accurate summaries of these hearings.

And under the heading of abuses during the transitional period: first, the on-again-off-again appeals process from September to the present has had the net effect of denying personal hearings before appeal boards to many men whose cases were pending when Congress passed and the President signed the 1971 law.

Second, the System was in such a hurry to deny student deferments to college freshmen that it acted over 3 months before the law and regulation were in effect allowing the denial, and enlisted college registrars in its illegal action.

Third, aliens and surviving sons newly exempted by the 1971 act were never notified of the new law or asked to provide evidence of their eligibility for exemption, and so are still unaware of their new rights. As a result, some may well have been illegally inducted in November and December, or may be when inductions are next resumed.

Fourth, though the law went into effect on September 28, 1971, there are indications that the System ignored its requirement that reasons be provided on request to men whose claims are denied, at least until its regulations began to go into effect on December 10.

Evidently State and local personnel feel no obligation to obey the law, but only the instructions they get from National Selective Service headquarters.

And fifth, the recent release from military obligation of thousands of men under postponed induction orders or extended liability to induction, while fair and even generous to these men, seems based on ad hoc policies without basis in any statute or regulation. Any younger men drafted later in 1972 may justly complain that they are taking the places of those allowed to go free.

What it adds up to is an end-run around Congress. The rights and interests of registrants can only be harmed by this policy, and the hope for greater fairness as a result of the 1971 amendments is being dashed. This policy does not even serve the narrow interests of the Selective Service bureaucracy, for while many young men, especially those less educated and less advantaged, may obey even illegal orders from their draft boards, many others will challenge these policies, and the Selective Service System may continue for a long time, as it was last fall, to be tied down by litigation and court injunctions in many parts of the country, if it continues to enforce policies contemptuous of the law and basic fairness.

I do not place great hope in draft law reform. I oppose any military draft, and will continue to speak against conscription as a violation of American ideals of personal freedom, an anachronistic survival of slavery in which young men are forced to do work they don't choose at low wages under pain of imprisonment or exile, an infusion of dangerous militarism, and a grant of power to the military establishment which it has proven itself in recent years unqualified to possess. However, while there is a draft law on the books and a Selective Service System to administer it, I believe that every procedural right and every freedom of choice which the statute or constitutional due process create for registrants must be protected from encroachment due to bureaucratic power-hunger or laziness disguised as efficiency, either of which will gladly substitute arbitrary fiat for freedom of choice.

I imagine some members of the Senate hoped, when they voted to confirm the appointment of Dr. Curtis W. Tarr as Director of Selective Service nearly 2 years ago, that the worst abuses of General Hershey—the arbitrariness, the sudden, unpredictable, and illogical changes in policy, the indifference to most public or congressional or judicial opinion—would be replaced by a fairer, more responsive and open, more sensitive Selective Service administration. Last fall's and this winter's experience makes clear that this is not to be. The Selective Service System remains essentially lawless.

I understand from the January 30 Chicago Sun-Times that after Dr. Tarr finishes making the Selective Service System a model of fairness and efficiency, he is slated for appointment to the State Department as Undersecretary for Security Affairs to administer the Foreign Assistance Act, and I guess the Senate will know a little more about his talents when he comes before you for confirmation next time.

(The prepared statement of Joseph Tuchinsky follows:)

STATEMENT OF JOSEPH S. TUCHINSKY

In this written statement I wish to offer a few examples which suggest the extent and variety of abuses committed in recent months by the Selective Service System. I shall limit myself to instances of recent regulatory directives which conflict with the letter or intent of the Act or existing regulations, or exercise authority no statute gives to the Selective Service System, and to instances of temporary policies followed during the transitional period beginning while the 1971 Act was pending which violated the intent or letter of the statute or existing regulations. Even with this limited scope, my examples are very far from exhaustive. I have chosen examples which seem to me illustrative of the philosophy, policies, or endemic practices of the Selective Service System.

I. REGULATORY MATERIAL IN CONFLICT WITH THE INTENT OF CONGRESS OR NOT AUTHORIZED BY STATUTE

1. The 1971 amendments to the Military Selective Service Act added Section 22, reading as follows:

SEC. 22. (a) It is hereby declared to be the purpose of this section to guarantee to each registrant asserting a claim before a local or appeal board a fair hearing consistent with the informal and expeditious processing which is required by selective service cases.

(b) Pursuant to such rules and regulations as the President may prescribe—

(1) Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service System to testify and present evidence regarding his status.

(2) Subject to reasonable limitations on the number of witnesses and the total time allotted to each registrant, each registrant shall have the right to present witnesses on his behalf before the local board.

(3) A quorum of any local board or appeal board shall be present during the registrant's personal appearance.

(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision.

These provisions can be viewed as a beginning toward a Registrant's Bill of Rights—or might be if meaningfully implemented. However, the evident intention of these provisions is now being quite effectively undermined by regulations issued by the Selective Service System. In many cases these regulations are neither republished 30 days in advance of effectiveness (as the 1971 Act amended Section 13(b) to require) nor published by the government at all. The new regulations and directives, followed religiously by local and state personnel of the Selective Service System, are making a mockery of the intent of Congress.

Section 22 of the Act contemplated a fair hearing at each level of Selective Service processing, with the right to offer witnesses at the local level. The first recommendation of the 1967 Presidential Commission headed by Burke Marshall to be acted upon was to expand the 10-day period then allowed for requesting hearings and appeals to 30 days following the local board's mailing of a man's Notice of Classification. Perhaps this change recognized the realities of a mobile society, a less-than-perfect postal system, and the existence of young men who may sometimes experience other problems in their lives which distract them from dealing with a new draft classification for a few days. And perhaps it honored the need of the registrant for time to consult with parents, ministers, counselors, or a lawyer before taking or waiving actions with potentially far-reaching implications. Even before 1967, men traveling outside North America and the U.S. territories were allowed 60 days to appeal, perhaps recognizing the realities of international postal service. Now, soon after Congress enacted its guarantee of a fair hearing, the Selective Service System has reduced the time for requesting a Presidential appeal to 15 days, and has published but not yet enacted regulations similarly reducing the time for requesting a local or state hearing. We have come nearly full circle. And this time limit applies to all registrants, even the Peace Corpsman serving in East Africa. There is an elastic clause allowing a local board to accept a man's request filed after the 15 days "if it is satisfied that his failure to appeal within such period was due to some cause beyond his con-

trol" (Regulations 1624.2, 1626.2, 1627.1(b), as prepublished in the Federal Register on January 12, 1972). Thus discretionary privilege, to be granted or denied at whim, replaces the legal right to a reasonable period of time to request one's rights. Is it unreasonable to wonder if the motives for the change included a desire to reduce the number of men using their new rights to a "fair hearing"? Is it unreasonable to observe that it is especially the poor and ill-educated who are likely to have difficulty maintaining an address at which mail will reach them promptly, and therefore lose their appeal rights?

Even the man who meets the deadlines is likely to find his new rights less than satisfying. Congress guaranteed the right to present witnesses at a hearing before the local board, "subject to reasonable limitations on the number of witnesses and the total time allotted to each registrant." The proposed regulations consider "reasonable" a time limit of "normally 15 minutes," which is expandable at the board's discretion. The more rigid board is thus free to schedule hearings at 15-minute intervals, allowing a man trying to present all the facts of his family hardship situation, or good evidence of the sincerity of his conscientious objection, to present three witnesses, each of whom might speak for four minutes, leaving the registrant three minutes to state his own case—if the board members' questions, hopefully relevant ones, haven't used them up. Then the man is dismissed from the room so the board can make a hasty decision and move to the next hearing. Our experience tells us that some draft boards will be far more flexible than this, and that many others will behave in precisely this manner. Many registrants, forewarned of this possibility, will elect not to use the right to present witnesses, to insure some opportunity to state their own case before time is called. Even without witnesses, the 15-minute hearing before the National Appeal Board (Regulation 1627.4(d)) would be inadequate for nearly any serious claim, and many men would despair of the worth of undertaking what might be a long and expensive trip with no guarantee that he will get more of a hearing than that. Thus do the new regulations leave draft boards free to deprive men of the rights that Congress created.

The absolute regulatory prohibition on more than three witnesses seems improper for similar reasons. In most cases three would be adequate. But in the exceptional case the regulation leaves the board without freedom to judge for itself what are "reasonable limitations on the number of witnesses." Consider the man applying for an extreme-hardship deferment. At his personal appearance before the local board, he would almost certainly wish to present his dependents, perhaps more than one person: his family doctor if the medical disability of a dependent were at issue, which is often the case; his caseworker if the family were receiving welfare or agency aid; and perhaps his employer, a clergyman, or one or more neighbors who could testify to the home situation and his contributions to its needs. It must be remembered that Selective Service has given the registrant the burden of proving his eligibility for any classification other than 1-A, although Selective Service has consistently forgotten to notify registrants of this burden. To complicate the situation still further, the Selective Service System requires all men to make all their claims at the same time and normally allows them only one hearing or appeal on all of them together. So if the hardship-deferment claimant were also a conscientious objector, it would be vital that he also present several witnesses who can testify to his sincerity and his religious beliefs. What would be a "reasonable limitation" in one situation could be quite unreasonable in another.

Congress in Section 22 also required that boards provide reasons when they deny men's claims. We have quite a bit of experience with the reasons boards provide, since the great majority of Federal courts were insisting on this requirement even before Congress put it into the statute. In a recent case, a New York State local board had turned down a conscientious objector claim with an irrelevant and verbatim quotation from Dr. Tarr's infamous Local Board Memorandum 107 on the standards to be applied in conscientious objector claims, followed by the single word "expediency." It didn't cite a single fact from the man's file or make any reference to the hearing it had just held with him. And the appeal board, in Illinois where the young man was then working, was even more cryptic: it turned his claim down and stated its "reasons" by checking several items on a list provided by Illinois state headquarters. Since neither board recited any facts, there was no way the reg-

istrant could rebut the conclusion they reached. We recently filed an *amicus curiae* brief before the Seventh Circuit Court of Appeals in this case, protesting this kind of treatment of registrants.

This case arose before the amendment Congress enacted last fall, but we expect similar abuses until the Selective Service System explains to local and appeal boards the difference between reasons and mere conclusions. As illustrations of how widespread this misunderstanding is, and how grievous the abuse will be for the registrant, I have reproduced in Exhibit A the most recent Illinois memorandum on the subject, and in Exhibit B a form sent this month by a Pennsylvania local board to one of its registrants. National Selective Service Headquarters has given its state and local personnel no guidance whatever in giving meaningful, factual reasons to registrants. Indeed, it had under consideration for a time—and may still—a 14-page draft of a Local Board Memorandum which goes further toward creating false standards and encouraging boilerplate reasons than these Illinois and Pennsylvania publications do. I have appended this draft as it was reprinted in CCCO's Draft Counselor's Newsletter, containing the full text in a condensed typographical format (Exhibit C). This draft seems to have had wide circulation within the Selective Service System, and may well have spawned a number of the more repressive state directives on the subject even though it was never officially issued itself.

These abuses threaten the implementation of the reforms Congress enacted in Section 22 of the Act even before the Selective Service System has put all its regulations into effect or fully resumed normal procedures.

2. In addition to the watering down of Section 22 rights Selective Service is now in the process of undercutting its own regulations. The most conspicuous example arises in registration procedures. The newly promulgated (but unpublished) "Registration Questionnaire," SSS Form 100, put into use late in January at some local boards, replaces a "Classification Questionnaire" with the same number. Regulation 1621.10, as it is now in effect, provides that this form is mailed to the registrant, who must return it within 10 days after the mailing date. That's little enough time for an 18-year-old to gather information and make decisions about the alternative classifications for which he can initiate claims on this form, and little enough time to talk with his family, a draft counselor or lawyer, his minister, or others who may help him with difficult decisions. The proposed revision of Regulation 1621.10, unpublished January 12, 1972, but not yet in effect, changes the language to refer to the Registration rather than the Classification Questionnaire, but it leaves intact the mailing requirement and the 10-day deadline for return. But the so-called Regulations are only for show. The clerks in the Selective Service System, at the operative level, pay no attention to them. They operate by a new set of directives called the Registrants Processing Manual, supplemented by the directives they get from their state headquarters. And if you look at Section 613.1, paragraphs 6 and 7, of the Registrants Processing Manual, issued January 14, 1972 (but not officially published or prepublished), you discover that the registrant doesn't get the 10 days: "Upon the establishment of his eligibility to register, the registrar will issue the Registration Questionnaire (SSS Form 100) to the registrant and provide instructions in its preparation. The registrar will provide such assistance as is required in order for the registrant to complete the Registration Questionnaire . . . After preparation and signing by the registrant, the registrar shall review the Registration Questionnaire (SSS Form 100) for completeness, accuracy of descriptive information provided, and verification of the registrant's signature as entered. The registrant must sign the completed Registration Questionnaire in the presence of the registrar. . . ." When I first read that, I didn't think it meant the form would be mailed out to be returned within 10 days, and so I wrote to Dr. Tarr not only to protest that the Registrants Processing Manual had not been placed in the Federal Register but that these instructions seemed to require the registrant to fill out the form on the spot, deprived of the opportunity to reflect on the questions or seek independent advice. My letter and the reply from Selective Service General Counsel Walter H. Morse are appended (Exhibits D and E). Evidently Mr. Morse feels I had misunderstood the RPM language, which he says does not require but merely permits men to fill out the form on the spot. But I am not the only one guilty of this misunderstanding. Here is a section from Clerical Procedure No. 4-4, issued by

Illinois state headquarters on February 18, 1972, to boards in its state: "Upon the establishment of his eligibility to register, the registrar will issue the Registration Questionnaire (SSS Form 100) to the registrant and provide instructions in its preparation. . . . A registration is not complete and should not be certified by a registrar until all items on the Questionnaire are completed. Under no circumstances will a registrant be permitted to take a Questionnaire out of the registrar's office for the purpose of obtaining information and completing the form. If the registrant does not have the required information, he must obtain it and return in order that he may be registered" (Exhibit F). In Chicago, ghetto residents can be seen daily at the draft board office on Pershing Road filling out the complex Form 100 on the spot, without ever being informed that they have a right to ten days to obtain impartial advice and necessary information before completing that vital questionnaire which they had no way of knowing they would be required to execute when they arrived at the board to register. I have been told of similar practices in Michigan and Maryland, and am sure they are far more widespread. Even though they have been rewritten to limit registrant's rights, the published regulations are relatively liberal compared with the unpublished directives which contain the Selective Service System's real regulations.

3. Not only do some state directives spell out the reality of national policies, as in the Illinois directive quoted above, but some go even further than national policies in limiting and harming registrants. Earlier this month I had some correspondence with "Jim," a college student from a city in Ohio. Because he had a relatively high lottery number, in December 1971 he sought to give up his 2-S deferment to complete his exposure in the draft in 1971, when his number was not needed to fill calls. This right, used by thousands of men in late 1971, is allowed by Part IV of Local Board Memorandum 99, which provides: "The local board shall also promptly consider for reclassification any registrant who requests in writing that his current deferment be ended and who is currently classified in one of the following classes: Class 1-S, Class 2-A, Class 2-C, Class 2-D, Class 2-S, or Class 3-A." Jim had previously applied as a conscientious objector, and of course did not intend to give up his beliefs as he ended his college deferment, so he concluded his letter, "In lieu of II-S, I request I-O" (the service classification from which men are drafted to perform civilian alternate service). The local board clerk wrote back that Jim could give up his 2-S only if he would accept a 1-A classification, implying withdrawal of his CO claim, and she cited "our administrative Memorandum No. 53" as her authority. Jim copied the directive in question at the local board office and sent it to me. Over the signature of the Ohio State Director Thomas S. Farrell, Administrative Memorandum No. 53 (1971), dated December 10, 1971, adds a provision not in LBM 99 in providing that "any registrant classified 1-S, 2-A, 2-C, 2-D, 2-S, or 3-A may request his deferment be dropped in favor of 1-A . . ." (emphasis added). Thus do Selective Service State Headquarters often exceed or contradict the provisions of national Selective Service directives, and it is evident that national headquarters exercises little or no control over the voluminous quantities of written directives sent to local boards by state headquarters. The policy differences are sometimes great enough that one can regard the Selective Service System as a federation of 56 state and territorial fiefdoms. This was even more true under General Hershey, but it remains substantially true under Dr. Tarr.

4. Even when national directives are followed, it is not always certain that they are based on any power legally exercised by the Selective Service System. I have reproduced in the addendum to this statement a Letter to All State Directors (OO-43), issued by the Director of Selective Service on October 26, 1971, but never published (Exhibit G). It forbids registrants to use tape recorders at their hearings on the ground that their use is "not authorized by the selective service law or regulations." I note that breathing and the wearing of clothing are not authorized by Selective Service law or regulations either, but no one has suggested that these acts be banned on that ground. I wrote to the General Counsel of Selective Service to ask what statutory authority he had to issue rules on use of tape recorders and to point out that they might serve some registrants effectively in fulfilling their legal obligation subsequently to summarize in writing any new information they presented orally at a hearing (Exhibit H). Mr. Morse replied rather unconvincingly on the second point, but ignored the first question completely (Exhibit I). Evi-

dently the Selective Service System believes it can issue arbitrary directives in any area where Congress hasn't expressly forbidden it to do so, or deny any right not specifically guaranteed in the law, however reasonable or harmless.

II. VIOLATIONS OF THE INTENT OF CONGRESS OR OF EXISTING REGULATIONS DURING THE TRANSITIONAL PERIOD SURROUNDING PASSAGE OF THE 1971 ACT

1. There has been little information and much confusion among draft registrants concerning new statutory procedural rights enacted on September 28, 1971, and clearly great confusion also within the Selective Service System. On September 3, 1971, before the law went into effect, Dr. Tarr issued Local Board Memorandum 55, instructing local boards to notify registrants who had procedural rights pending that their cases might be delayed while more eligible men were considered first, and directing the boards to continue processing men in roughly the order of their eligibility for induction. On October 1, he sent a "personal letter" to each State Director (released and published at Selective Service Law Reporter page 2200:86), paragraph 7 of which directed: "No classification action shall be taken by any local board or appeal board, and no personal appearances shall be held, until new regulations are issued."

Then on November 2, though new regulations weren't yet issued, and wouldn't go into effect until December 10, he sent a telegram—not an Executive Order, not a published directive, but a telegram—to the State Directors ordering: "Classification actions by local boards shall be resumed immediately. . . . No personal appearances shall be held until the new regulations become effective. . . . Appeal boards shall resume classification actions in any cases where the registrant's appeal period expired prior to September 28, 1971, but shall deny action in any cases where the registrant's appeal period expired on or after September 28, 1971." In Illinois, the state headquarters issued a Special Memorandum to All Local Boards that very day transmitting Dr. Tarr's orders. And there, to the best of our knowledge, it stands now. Registrants, except those who got the form letter about delays based on order of eligibility, have no idea what is happening with the procedures they requested and are entitled to. Dr. Tarr has forgotten public statements he made last fall about stopping all processing so registrants with cases pending would have the benefits of the new procedures Congress enacted. He has authorized state appeal boards to decide cases under the old regulations, without any right to personal hearings for men whose period for requesting their rights ended before the new law was finally signed by President Nixon, even though no action was taken in most of these cases until after the effective date of the 1971 Act. Some states ignored this directive and have postponed these cases so the men may have the benefits of the new law when implemented by regulations, while in other states, including Illinois, we have reports of appeal boards acting on such cases and denying hearings. Thus, men whose files were not even forwarded to the State Appeal Board when the 1971 Act came into force have since had their cases decided—adversely—without ever being offered the opportunity and right to appear personally before that board.

2. Nor were those with pending appeals the only ones to suffer from transition-period abuses. Also on September 3, Dr. Tarr sent a letter to the registrar of every college and university in the United States advising that no Student Certificate forms be submitted for freshmen, and asserting that this would be in the students' interest (despite the fact that the new law was not yet in effect, and that even a briefly held deferment yields at least a reopening and appeal rights when it ends, which could serve as a hedge against induction for many months to allow a student to finish a school year). Most registrars accepted Dr. Tarr's illegal advice, though some ignored it and filled out forms for freshmen as usual.

To insure that freshmen wouldn't create extra work for the System by getting deferments they were entitled to and then having to be reclassified when the new regulations were put into effect, Dr. Tarr issued Local Board Memorandum 122 on September 22, six days before the new law was signed. It instructed local boards "effective immediately" to set aside the file of any man who entered college in the summer of 1971 or later and who requested a student deferment, neither to issue him an induction order nor to give him the 2-S deferment which Regulation 1622.25, then in effect, made mandatory

even if the new law were signed. The Act, when signed on September 28, authorized, but didn't require, the denial of college deferments to freshmen, and a new regulation was only finally put into effect utilizing this power of denial on December 10. During the interim, hundreds of thousands of college freshmen, legally entitled to 2-S deferments from September to December, and to appeal rights in December when the deferments would have ended, had no rights whatever. The Selective Service System chose not to obey its own regulations. Undoubtedly, any of these young men who receive induction orders when inductions are next resumed who can show that they wouldn't have received them if their temporary deferments had been received will have a strong argument to make in court.

3. Local Board Memorandum 122 also provided interim procedures for the men entitled to two new exemptions created by Congress in the 1971 Act. It instructed local boards to issue no induction orders to men whose Selective Service files indicate they are in the alien categories newly exempted from the draft or to men who claim eligibility for the new surviving son exemption. However, the System took no initiative whatever to inform its registrants that Congress was creating these new exemptions, to explain who might qualify for them or how to document the qualification, or to suggest that those who might be eligible should submit their claims. Nor were the files of these surviving sons and noncitizen registrants likely already to contain the information establishing their eligibility for exemption. Inductions were resumed in November and December without providing for any but those well enough informed to file claims spontaneously, and to this day no questionnaires have been sent to registrants inquiring about their eligibility for the newly created alien and surviving sons exemptions. There is no way to know how many men were drafted in November and December 1971 who were legally exempt under the 1971 Act but never knew it.

4. When Congress added Section 22 to the Selective Service Act on September 28, 1971, it provided: "In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision." As is indicated above, the System has continued reclassifications except from October 1 to November 2. Although this requirement is written into the effective and proposed regulations—in fact, commendably more generously than Congress required, for reasons are to be mailed to the registrant following local and state appeal board decisions without waiting for him to request them—no national directives have come to light detailing methods of providing reasons when men's claims are decided. We have found a state directive, however, which we think contains a widely followed policy, perhaps a national one which has been communicated telephonically from National Headquarters. A January 28, 1972, "Special Memorandum to All Local Boards" from Dean S. Sweet, the State Director for Illinois, provides in part:

2. You are reminded that when the new regulations, which were printed in the Federal Register on January 12, 1972, become effective on or about February 12, 1972, local boards must, when denying a request for a deferment, place the reason or reasons in the file and advise the registrant by letter of the reason or reasons for denial at the time the SSS Form 110 is mailed.

3. Registrants denied a requested deferment from December 10, 1971, until the new regulations become effective shall, upon request, be provided by letter with the reason or reasons for denial.

The latter paragraph is amazing. By directing boards to provide on request the reasons for only those decisions made on or after December 10, 1971, it indicates that the Selective Service System is obligated to obey only the regulations and other directives it receives from its National Headquarters, not the statute passed by Congress and signed by the President on September 28, 1971.

5. Finally, the Selective Service System's handling of the several categories of men under the lottery system has been totally arbitrary, though in many cases arbitrary to the advantage of many registrants. During the past month, three categories of men whose status was uncertain previously have been effectively released from draft liability. Those who entered the First Priority Selection Group by the end of 1971 and whose lottery numbers were considered to have been reached in that year without their being drafted became

eligible for an extra three months at the beginning of 1972 as members of the Extended Priority Selection Group, Subgroup B. Since the Defense Department decided to issue no calls for draftees in the first quarter, there is little question that these men in Subgroup B were entitled to pass to a safe category. However, the treatment of men who were under induction orders issued in 1971 and postponed, and those who were in exposed classifications at the end of 1970 and whose lottery numbers were reached in that year without their being drafted (designated Extended Priority Selection Group, Subgroup A), was totally arbitrary. The System has sought to justify the decision to release these men in terms of basic fairness, citing the length of periods during which they were held up in processing and the desirability of limiting their liability to 270 days or some other period. But the fact is that these decisions, though perhaps fair and certainly generous to these men, are totally arbitrary, based on no provision of the statute or officially published regulations, but governed by directives and communications issued on an ad hoc basis, one of the most arbitrary of which, a "private letter" sent by Dr. Tarr to each State Director on February 9, 1972, is reproduced as Exhibit J. I am glad of the good fortune of those who have been released from their long periods of uncertainty and risk, but I anticipate that younger men who are drafted later in 1972, if there are draft calls this year, will with considerable justification complain that they are being taken only because more eligible men were illegally let off at the beginning of the year. And again the System will be mired in controversy and litigation as it has been fairly continuously since last fall because of its own failure to publish and adhere to a logical, clear, consistent set of official regulatory policies.

CLAIMS OF CONSCIENTIOUS OBJECTOR

Finding on sincerity. Federal Circuit Courts have held that where a registrant states a *prima facie* C.O. claim (a claim that on first view or before further examination appears good) a local or appeal board must make a specific ruling finding insincerity and the reasons therefor, to legally reject such a claim.

In passing on C.O. claims, Illinois boards are specifically referred to recent LBM 107 where they will note that the primary test is that of "sincerity".

The 7th Circuit Court of Appeals (includes Illinois) held that the question of C.O. is a delicate problem and that "*in conscientious objector cases, prima facie stated*", the Court cannot determine the legality of the board's decision without the board's written finding that belief is not sincerely and deeply held and without some "*basis in fact*" for such a finding. Please note that the Court did not require reasons for decisions on any other type deferment classification other than the difficult question of conscientious objection. Bona fide C.O.'s should be given Class I-O (whether the claim was filed before or after induction notice), but where a board is not convinced of sincerity, it should make a written finding stating reasons.

Following are examples of conclusions that may be used as guidelines to making determinations on requests for classification as a conscientious objector. In addition to the conclusion or conclusions which apply, it is most important that the reasons for arriving at the conclusion are clearly stated if the board determines not to grant the requested I-O classification. The reasons must be based on evidence obtained by the board, either from the registrant's file or from a personal interview.

CONCLUSIONS

1. Sincerity.
2. Timeliness of claim.
3. Attitude.
4. Other people to substantiate claim.
5. Lack of religious or ethnic training and/or belief.
6. Number and types of previous deferments.
7. Age.
8. Delinquency in any formal matters.
9. Complete selective service file.
10. Basis for belief.
11. Opposition to this war or all wars.
12. Opposition to selective killing or all killing.
13. Overall demeanor.

REASONS

(a) Insincerity based on the fact that registrant used various other deferments and lastly resorted to a claim of conscientious objector in an obvious attempt to avoid military service.

(b) Convictions not deeply held indicated by fact that registrant stated that he is a conscientious objector but did not support his claim with sufficient evidence or convincing evidence.

(c) Lack of evidence of religious training and activity where a religious belief is claimed as a basis for conscientious objection.

(d) Claim is frivolous and not supported by factual evidence.

(e) The information presented by registrant in support of his claim for reclassification is not convincing of deeply held moral or religious convictions to conscientious objection of war in any form.

(f) Claim is based on a particular war rather than on all wars. Registrant repeatedly states that he is against Vietnam war.

(g) Registrant's statements refer to one war rather than war in general and are statements of political views.

(h) Any other reason that leads to doubt based on some fact that is evident.

Such reasons should be amplified as much as possible relating to specific information contained in the registrant's file.

SELECTIVE SERVICE SYSTEM,
Pittsburgh, Pa., February 1, 1972.

Pittsburgh, Pa.

DEAR MR. ———: At the meeting of a quorum of your Local Board's Members on January 20, 1972, your claim for a Conscientious Objector status was considered by them. The encircled item(s) on the attached sheet indicates the factors relative to their reaching a decision in your individual case.

Yours truly,

THOMAS H. CAMERON,
Assistant Executive Secretary, Local Board No. 4.

REASONS FOR DENIAL OF CONSCIENTIOUS OBJECTOR STATUS

(1) Your stated beliefs were determined to be questionable, vague, insufficient or lacking in conviction to qualify for requested classification.

(2) The evidence and/or information which you submitted in support of your claim was devoid of sincerity of belief and/or expressed a purely personal moral code which would not necessarily entitle you to a Conscientious Objector status.

(3) The evidence which you offered in support of your classification request was not substantial or of an insufficient nature.

(4) You did not express a bona-fide belief or did not actually claim a Conscientious Objector status.

(5) Your reasoning, logic, and/or commitment appear extremely doubtful despite well-documented, voluminous supporting statements relative to your claim for Conscientious Objector status.

POSSIBLE INSTRUCTIONS TELLING DRAFT BOARDS HOW TO DENY CO CLAIMS

A draft of a proposed Local Board Memorandum, entitled "Statement of Reasons for Denying Classification as a Conscientious Objector," is now circulating within the Selective Service System. CCCO has obtained a copy, and we publish the entire text below. Note that this is not an effective LBM or even an official, published proposal; it is someone's working draft. However, something like it may eventually be sent to draft boards.

1. To insure a registrant due process of law in the consideration of his claim for classification in Class 1-O or 1-A-O, it is imperative that local boards and appeal boards (including the National Selective Service Appeal Board) include in the registrant's file a statement of the reason(s) for denying the requested classification. This Local Board Memorandum is intended to assist board members in analyzing claims for classification as a conscientious objector and in preparing the required statement.

2. Processing of claims for classification as a conscientious objector starts

with receipt of Special Form for Conscientious Objector (SSS Form 150) or other written statements stating a claim for conscientious objector status. After recording in the minutes of action the receipt of such claim, the SSS Form 150 and other written claims for classification in Class 1-O or 1-A-O should be analyzed.

3. Types of decisions on claims for conscientious objector status are:

(a) Grant claim for 1-O or 1-A-O as requested because registrant presented prima facie claim which was supported by facts in cover sheet and presented at personal appearance;

(b) Deny the claim for 1-O or 1-A-O which the registrant claimed because he did not present a prima facie claim for the classification.

(c) Deny registrant's claim although he presented a prima facie claim for 1-O or 1-A-O.

(d) Grant the registrant a 1-A-O classification even though he had requested 1-O classification. The registrant who requested classification in Class 1-O should be classified in 1-A-O only when one of the following circumstances exists: when it is clear from the information presented by the registrant that his opposition is only to "bearing arms" and not to noncombatant service; or when the registrant is not certain whether his conscientious objection extends to noncombatant service.

Under no circumstances is Class 1-A-O to be used when the local board cannot decide between Class 1-A and Class 1-O. A registrant who has claimed 1-O should be considered for classification in Class 1-A-O before classifying him 1-A even if the registrant does not want to be 1-A-O. If the registrant is classified in Class 1-A-O specific evidence supporting this classification must be in the cover sheet and recorded in the minutes of action.

4. A prima facie claim is a claim that, assuming the truth of the statements made in its support, would be a sufficient basis for a 1-O classification. A prima facie claim should generally present factual allegations sufficient for the local board to be able to determine the depth, nature, and extent of his opposition to military service. The elements of prima facie claim may include the following: (a) registrant is conscientiously opposed to participation in war; (b) registrant is opposed to all wars; (c) registrant shows religious, ethical or moral basis for his claim; (d) registrant shows training, events, or experiences which establish the point of origin of his opposition to war; (e) registrant shows how he has expressed his beliefs to others; and (f) registrant's claim is supported by statements of others which indicate that he is sincere in making his claim. If one or more of the above elements is lacking, the registrant's claim may be denied, and the reason(s) for the denial would be whichever element(s) is (are) lacking.

5. To deny a prima facie claim, the reasons for such denial must be stated, and these reasons must be supported by affirmative evidence in the registrant's cover sheet which shows that the statements of his beliefs are not what they appear to be. Where the granting or denying of the classification depends on subjective facts, mere disbelief is not a sufficient basis in fact for denial of the claimed classification. The inconsistent fact or insincere element must be evidenced in the cover sheet and stated as a reason for denial.

6. In analyzing a prima facie claim for conscientious objection, the registrant's cover sheet and information obtained at his personal appearance should be examined in terms of the following factors:

6.(a) *Nature of Claim.*—Is the registrant's opposition to war based on primarily political sociological, philosophical grounds, or solely on personal moral code? If "yes," this may be a sufficient reason for denial *if* such grounds are established in the cover sheet. Note, however, if opposition to war is on a political, sociological, philosophical basis as well as a religious, ethical, moral basis, then his claim is not necessarily deficient. The determining factor would be which of these two categories is the more controlling. Policy, pragmatism and expediency are a little difficult to understand as they would apply to a conscientious objector claim. The term "policy" means a course or plan of action, especially one of administrative action; or any system of management based upon material or self interest as opposed to a higher principle such as equity. "Pragmatism," on the other hand, means the philosophical doctrine that practical results are the sole test of truth. "Expediency" means actions because of suitability or self interest as distinguished from action motivated by principle. In viewing the meanings of these three key words, it is clear that some form of selfish interest is common to each. Therefore, in determining whether

a registrant's claim of conscientious objection is based upon policy, pragmatism or expediency, the element to search for is selfish interest of the registrant and his apparent disregard for anything but his own well being and his own belief of what is right or wrong. If such indications are in the cover sheet, then they may be a basis for denial.

6.(b) *Opposition To All Wars.*—Is registrant's professed opposition to all wars consistently evidenced by all his statements or is he a selective objector? To rely on selective objection as a reason for denial, there must be specific instances on such objection contained in the cover sheet: Continued exclusive abhorrence of the Vietnam War may be indicative of selective objection.

6.(c) *Sincerity Of Claim.*—If the local board finds a registrant's claim to be insincere, lacking in veracity, or otherwise insufficient, a reason for such finding must be supported by facts contained in the registrant's cover sheet or disclosed at the registrant's personal appearance. Such facts can also be found in information supplied by the registrant, his friends, or solicited from references. There are many facts, incidents, characteristics, or mannerisms which may or may not be indicative of an insincere claim. The following attempts to depict a manner of analyzing a claim to see whether it is sincere.

6.(c) (1) Does the information presented by the registrant or others indicate a life style inconsistent with his stated beliefs? Examples of such inconsistent information and acts include: violent acts, conviction for crimes of violence, employment in a defense-oriented operation, deliberate hostile attitude or mannerisms and deliberate shiftiness or evasive or antagonistic manner. The foregoing may be weighted to determine or help ascertain whether or not a registrant is sincere. If the registrant's acts, other than nervous mannerisms or apprehensive behavior, are markedly inconsistent with his professed beliefs, or if his life style greatly varies from his professed beliefs, these may be reasonable indications that his claim is insincere. If such a conclusion is reached, it must be supported by facts contained in the registrant's cover sheet or developed at his personal appearance and recorded in the summary of the appearance. If no facts are contained in the cover sheet, then a life style inconsistent with stated beliefs cannot be a basis for denying his conscientious objector claim.

6.(c) (2) How long has the registrant been opposed to participation in any war? The length of time a registrant has held his professed beliefs is obviously relevant in a determination of sincerity. Time alone, however, is not absolutely determinative. For example, if the registrant has held his beliefs for only a short time span, his claim should show a religious experience, educational experience, traumatic event, historical occasion, or some type of dramatic occurrence or situation which indicates the point at which his objection to war originated. If there is no such indication in the cover sheet or from the personal appearance, then this short time period takes on more validity as a reason for denial. If the registrant has held his beliefs for a long time, his claim should show how his beliefs developed from the point of origin to the present. This may be shown by evidence of public expression of his conscientious beliefs, statements of his friends, his educators, his ministers, and other relevant people. This development can also be shown by the registrant's description of his behavior which shows action and behavior consistent with his alleged convictions. In analyzing the effect of time on the sincerity of a registrant's belief, factors which tend to detract from the registrant's sincerity must be evidenced in the file or, if omitted from the file, the obvious omission must be noticeable in the cover sheet or this cannot be an adequate basis for denying a registrant's claim.

6.(c) (3) Has the registrant requested inconsistent classification(s) such as a 1-D or 2-A to work in a defense industry? Were these inconsistent classifications claimed prior to the point of *crystallization*? (The time of crystallization is the time when the registrant claims he first became conscientiously opposed to war. This point may be marked by a sudden development of beliefs or by the beginning of a slow, deliberate growth process.) If the inconsistent classification were claimed prior to the point of crystallization, then they alone are not proof of an insufficient claim. If, however, inconsistent classification(s) were claimed subsequent to the point of crystallization, then they are significant indications of the registrant's insincerity or at least instability of belief.

6.(c)(4) Was the registrant's demeanor at the courtesy interview or personal appearance inconsistent with his stated beliefs: If the affirmative response to this question is relied upon by the local board, then specific examples of inconsistent mannerisms (not necessarily nervous, frightened, or apprehensive behavior), evasive answers to questions, hostile words, motions, statements, or answers to questions, should be explicitly described and recorded in the summary of the personal appearance. If no concrete example of these inconsistencies can be noted, then the registrant cannot be denied a conscientious objector status for this reason.

6.(c)(5) Were the registrant's answers to questions at his personal appearance in variance from his statements made in his SSS Form 150 or other written claim? If the registrant's answers are so inconsistent from those statements made in his SSS Form 150 that they show a marked shallowness or instability of belief, or indicate that the registrant does not believe what he says in his SSS Form 150, or that the statements in the SSS Form 150 do not appear to be his own, (i.e., they were copied from another source), and these instances can be established by facts contained in the cover sheet, this may be a proper grounds for denial of a claim for 1-O. In analyzing this basis as a possible reason for denying a 1-O claim, it must be remembered that a registrant need not be articulate, nor need he be very eloquent in explaining why he believes as he does. In addition, his answers need not be identical to those stated in his SSS Form 150 nor be identical to the tenets of his church. They must only evidence a reasonable degree of consistency and compatibility with his major premise(s) of conscientious objection to war.

6.(c)(6) Are the registrant's convictions sufficiently deep to justify a conscientious objector status? In conjunction with a determination of whether or not a registrant is sincere, an analysis of the depth of the registrant's beliefs is also in order. If the local board believes that the registrant's beliefs are immature, shallow, or not a driving force in his life, they may state such a reason for denial of the claim. The local board must, however, specify the objective facts in the cover sheet or personal appearance which led them to this conclusion. There are several factors, responses or characteristics which may help in the analysis of the depth of the registrant's beliefs.

1. Are the registrant's actions compelled the same as those of a traditional, religious person? If the registrant professes that his beliefs are those of a traditional church and if he claims these beliefs as the basis of his objection, then he must sustain a burden of showing that he basically adheres to these beliefs.

2. If the registrant's convictions are not of a traditional nature, are they held with a strength of the beliefs of a traditionally religious person? For this category, the registrant may have a hybrid of beliefs; that is, the basis of his objection may be founded both on traditional, religious beliefs and non-traditional, moral or ethical standards. Thus, the local board must weigh these beliefs and look to the extent to which they control his life. The overall influence that such beliefs, however founded, have on his life is significant.

3. Do the registrant's convictions play a significant role in his life? Are these convictions, whatever their basis, as controlling or as guiding a force in the registrant's life as the convictions of a traditionally religious person? Reliance on a negative response to these questions must be supported by clear indications that the registrant's beliefs are only on a theoretical or academic level and do not influence the manner in which he conducts his life.

4. Are the registrant's convictions consistent or inconsistent with his life style as evidenced by information in his cover sheet or personal appearance? If the local board determines that the registrant's claims are inconsistent and thus that his beliefs are not mature, they must establish this inconsistency by objective facts in the cover sheet. Indications of a life style that is inconsistent with conscientious objector beliefs include participation in violent protests, convictions for crimes of violence, record of violent conduct such as brawling, fistfights, or cruelty.

5. Does the registrant have a lack of knowledge of the beliefs, whatever the nature of these beliefs, he professes to follow? If the registrant claims objection on a traditional religious basis, he should be able to explain the rudimentary principles of that religion. The registrant does not have to be very articulate, nor is he required to be able to establish completely the history and nuances of his religion, nor must he subscribe to all the tenets of his church. He must, however, be able to explain the basic tenets of the religion

and how they apply to his life and compel him not to participate in any war. On the other hand, if the registrant claims objection on the basis of beliefs that are of moral or ethical nature rather than of a traditional religious nature, he must be able to explain the basic principles or guidelines of his beliefs, their origin, and how they influence his life.

6. Action Taken If the Claim for 1-O or 1-A-O is Denied—If the local board determines that the registrant does not qualify for a 1-O or 1-A-O classification, the following is required: (a) The factual basis for denying the 1-O or 1-A-O status must be evidenced by information in the registrant's cover sheet. The sources of this information include: the SSS Form 150 or written claim for conscientious objector status, statements from the registrant's references or others, summaries of personal appearances or interviews, and any other information supplied by the registrant or others provided that the registrant has notice thereof. (b) The reason for denying the registrant's claim must be recorded in his file. (c) The registrant should be notified of the reason or reasons for denying his claim for conscientious objector status in accord with instructions of the Director.

We will not attempt to explain here the misleading and illegal elements in this LBM; most counselors will notice much of this themselves. Those who object to the proposed LBM may wish to let Selective Service National Headquarters know their feelings before it is issued.

Here and There.—The General Counsel of Selective Service has ruled that a local board must reopen classification when a doctor files a prima facie 2-A claim. Furthermore, if he requests consideration by the state medical advisory committee when he appeals, the file must be considered by the committee before the appeal board acts.*** The National Health Service Corps, a new government agency created by Congress to provide medical care in doctor-short areas, is actively recruiting doctors, nurses, dentists, and other medical personnel. Service in the Corps is likely to be approved as alternate service, provided one chooses civil-service employment rather than a Public Health Service commission. Those interested should write NHSC at 5600 Fishers La., Rockville, Md. 20852.*** A Kansas City counselor writes that a draft board was infuriated when a man refused to take the oath at the personal appearance. Perhaps the man should have written the board ahead of time, explaining why he intended to affirm.

MIDWEST COMMITTEE FOR DRAFT COUNSELING.

Chicago, Ill., February 10, 1972.

DR. CURTIS W. TARR,
Director, Selective Service System,
Washington, D.C.

DEAR DR. TARR: Why has the Selective Service System not published the sections of the Registrants Processing Manual which it has promulgated in the Federal Register, either as prepublished proposals or as effective regulations?

I have just read Section 613.1 of the Registrants Processing Manual and cannot imagine any argument that would persuade anyone that these are not regulations within the meaning of Section 13(b) of the Selective Service Act. I note that Subsection 7 of this section requires new registrants to complete the Registration Questionnaire (Form 100) at the local board office at the time they register, stating that they "must sign the completed Registration Questionnaire in the presence of the registrar." This simply contradicts the presently effective Regulation 1621.10, which allows a registrant to mail back his questionnaire within ten days after it was rendered to him, and the revised Regulation 1621.10 published as a proposal in the Federal Register for January 12, 1972, would continue this right.

In one case brought to my attention today, a man who was registering at a Midwestern draft board claimed his right to take the questionnaire home and complete it thoughtfully with the advice of his family and other advisers, promising to return it within the ten days allowed by the rules. The clerk refused to permit this, pointing to the requirement of the Registrants Processing Manual, and the young man's adviser was told, when he called the relevant state headquarters, that the clerk was right because the Registrants Processing Manual had superseded the Regulation! So whether you or your General Counsel meant the Registrants Processing Manual to function as a

new set of Regulations or not, it is quite clear that Selective Service personnel at all levels will treat them as Regulations.

I submit that failure to prepublish in the Federal Register is a violation of the Act passed by Congress in 1971. And in addition, it is a violation of the elementary fairness to registrants Congress sought to legislate. I hope you will reconsider. Although you promulgated the first sections of the Registrants Processing Manual on January 14, 1972, it is not too late to withdraw them and start the process provided by law.

Yours very truly,

JOSEPH S. TUCHINSKY.

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM,

Washington, D.C., February 15, 1972.

Mr. JOSEPH S. TUCHINSKY,

Midwest Committee for Draft Counseling,
Chicago, Ill.

DEAR MR. TUCHINSKY: Reference is made to your letter of February 10, 1972, in which you allege that there is an apparent conflict between subsection 7 of section 613.1 of the Registrant's Processing Manual and section 1621.10 of the regulations. You further state that local boards are giving effect to the Registrants Processing Manual to the extent that it supersedes the regulations.

It should be noted from my announcement of January 14, 1972, upon the issuance of the Registrants Processing Manual, that this manual is a compilation of instructions required to implement the Selective Service law and regulations necessary for the administration of the Selective Service System. The manual is not a regulation and accordingly is not subject to the requirements of section 13(b) of the Military Selective Service Act.

With respect to the alleged conflict between the manual and the regulations, it should be noted that the requirement that a registrant must sign the completed registration questionnaire in the presence of the registrar pertains only to that situation where the registrant completes the questionnaire in the presence of the registrar. Should the intent be to require this of all registrants and all questionnaires, the preceding statement that the registrar must verify the registrant's signature would be contradictory since the registrar is witnessing the signature in the first instance. Accordingly, section 1621.10 is not in conflict with subsection 7. In fact, subsection 7 implements section 1621.10 to provide relief to the registrant who elects not to return the questionnaire by mail.

I regret that one clerk at a local board has misinterpreted the language of the manual in light of the regulations. From this to say, however, that "it is quite clear that selective service personnel at all levels will treat them [Registrants Processing Manual] as regulations" is a conclusion without a basis in fact. However, so that similar misunderstandings do not occur, I am directing that the language in subsection 7 be restated to more clearly express the intent.

I do not concur in your opinion that the manual must be published in the Federal Register. Nor is a failure to do so a violation of fairness to registrants. In fact, the opposite conclusion is true since by use of the manual a registrant, as well as the clerk of the local board, has a simplified compilation of the law, regulations, and other operational instructions in one place as an easy, identifiable reference for assuring that the registrant is properly processed.

Sincerely,

WALTER H. MORSE,

General Counsel.

ILLINOIS HEADQUARTERS—SELECTIVE SERVICE SYSTEM

INSTRUCTIONS FOR REGISTRARS

1. It shall be the duty of (1) every male citizen of the United States, and (2) every male alien in a permanent residence status who is in, or who hereafter enters, the United States, who shall have attained the 18th anni-

versary of the day of his birth and who shall not have attained the 26th anniversary of the day of his birth, to present himself for and submit to registration.

2. Every person required to register shall do so within the period which begins 30 days prior to the 18th anniversary of the day of his birth, and which ends 30 days after the 18th anniversary of the day of his birth, except that any alien who incurs liability for registration after attaining the age of 18 shall register within 6 months of the day he incurred such liability to register.

3. *Identification of the Registrant.*—When a young man presents himself and submits to registration at his own local board, any other local board of Selective Service, or before any uncompensated registrar, it shall be the responsibility of the registrar to verify the registrant's identity through examination of the registrant's birth certificate, Social Security Account Number card, driver's license, school or college activity card, credit cards, or other means of identification that he may possess.

4. *Registration of Persons Separated from the Armed Forces.*—Any person not previously registered who (1) is separated from the Armed Forces of the United States after having *served honorably on active duty, other than active duty for training*, for not less than 6 months, or (2) has served as a commissioned officer in the National Oceanic and Atmospheric Administration or the Public Health Service for not less than 24 months, shall not be required to be registered. Question 1 of Series I—Military Record—on the SSS Form 190 has a block for a registrant to indicate whether or not he has completed 6 months of active duty—excluding active duty for training. If a registrant checks the yes box when registering, he should be required to produce a copy of his DD Form 214. If he meets the requirements above, the registration process should be terminated.

5. *Preparation of the Registration Questionnaire.*—Upon the establishment of his eligibility to register, the registrar will issue the Registration Questionnaire (SSS Form 100) to the registrant and provide instructions in its preparation. The registrar will provide such assistance as is required in order for the registrant to complete the Registration Questionnaire. If the registrant is unable to write or cannot write legibly, it is permissible for the registrar to complete the Questionnaire based upon the information provided by the registrant. The use of the Tally Sheet (SSS Form 4) is no longer required for registration and will not be used. A registration is not complete and should not be certified by a registrar until all items on the Questionnaire are completed. Under no circumstances will a registrant be permitted to take a Questionnaire out of the registrar's office for the purpose of obtaining information and completing the form. If the registrant does not have the required information, he must obtain it and return in order that he may be registered.

6. *Review and Certification.*—After preparation and signing by the registrant, the registrar shall review the Registration Questionnaire (SSS Form 100) for completeness, accuracy of descriptive information provided, and verification of the registrant's signature as entered. The registrant must sign the completed Registration Questionnaire in the presence of the registrar, except that if the registrant is unable or refuses to sign the Registration Questionnaire or to make a mark in lieu of a signature, the registrar shall sign registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of registrant. The act of the registrar in so doing shall have the same force and effect as if the registrant had signed the Registration Questionnaire and such registrant shall thereby be registered. Upon completion of the review of the Registration Questionnaire, the registrar will then certify to the registration and enter the date of registration on the form.

7. *Place of Residence.*—The registrar shall require the registrant to give sufficient address information to establish the proper location of his place of residence and mailing address for forwarding of notices. The registrant may determine what place he desires to give as his residence when he is not located in the same place all the time. On the second line on page one of the SSS Form 100, the county should be entered in parenthesis between the city and state if the identification of the county is necessary to determine the proper board of jurisdiction. The registrant must give a place of residence within the continental United States, the State of Alaska, the State of Hawaii,

Puerto Rico, the Virgin Islands, Guam, or the Canal Zone, if he presents himself for registration in any of those places.

8. *Forwarding.*—When registration has been accomplished at other than the local board of jurisdiction, the registrar will forward the Registration Questionnaire to the local board having jurisdiction over the registrant's place of residence, if known. Otherwise, it will be forwarded to the State Director of Selective Service concerned for transmittal to the proper local board.

9. An inmate of an insane asylum, jail, penitentiary, reformatory, or similar institution, who is required to be registered on the day he leaves such institution, shall be registered in the manner prescribed above. The superintendent or warden of such institution or any person designated by the superintendent or warden shall perform the duties of registrar.

10. When the Registration Questionnaire (SSS Form 100) is being filled out by the registrant, the superintendent, warden, or other designated person, acting in his capacity as registrar, shall be certain that no reference is made on the Registration Questionnaire to indicate that the inmate was registered in an institution or by an official thereof. If the inmate does not have a permanent place of residence or an address where he intends to be or where he can be located, the address of the local board of the area in which the institution is located shall be entered in item 2 of the Registration Questionnaire (SSS Form 100). Under no circumstances shall the address of the institution be given as the place of residence or as the mailing address of the inmate who is being registered.

11. The superintendent, warden, or other designated person acting as registrar shall then explain to the registrant his obligations under the Military Selective Service Act, particularly the requirement to keep his local board advised of his current mailing address.

12. The superintendent, warden, or other designated person shall mail the Registration Questionnaire (SSS Form 100) of a person registered under the provisions of this paragraph to the State Director of the state having jurisdiction over the area in which the institution is located.

13. Preaddressed envelopes and blank Questionnaires will be furnished all registrars. It is requested that registrars mail all completed Questionnaires to the parent local board on each Friday and on the last working day of each month. A short note may be enclosed with any mailing of Questionnaires to the parent local board requesting a resupply of envelopes and Questionnaires.

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM,
Washington, D.C., October 26, 1971.

Letter to all State Directors (00-43)

Subject: Use of Tape Recorders During Personal Appearances

The use of tape recorders during personal appearances before local boards or appeal boards is not authorized by the selective service law or regulations. Consequently, no tape recording equipment will be permitted at any personal appearance before a local board or appeal board. Executive secretaries should be requested to bring this promptly to the attention of the local board chairman or appeal board chairman.

DANIEL J. CRONIN,
Assistant Deputy Director, Operations.

MIDWEST COMMITTEE FOR DRAFT COUNSELING,
Chicago, Ill., December 21, 1971.

Mr. WALTER H. MORSE,
*General Counsel, Selective Service System,
Washington, D.C.*

DEAR MR. MORSE: I note that Selective Service National Headquarters has just issued Letter to All State Directors No. 00-43, forbidding registrants to use tape recorders at personal appearances, though it has evidently not published it in the Federal Register as a proposed or actual regulation.

I would appreciate your opinion concerning two questions:

1. Under what statutory or other authority is this regulation issued? How does the Selective Service System have legal control over recording devices in the possession of citizens who attend its hearings?

2. Why was the regulation promulgated by LTASD 00-43 not published for public comment thirty days before going into effect, then republished for enactment, as contemplated by Section 13(b) of the current Act?

Since this matter affects the rights and interests of many registrants who aspire to fulfill their obligation under Regulation 1624.2(b)—or its successor regulation—to summarize accurately in writing the information they present orally at personal appearances, I would appreciate your early response to these questions.

Sincerely,

JOSEPH S. TUCHINSKY.

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM,
Washington, D.C., December 30, 1971.

Mr. JOSEPH S. TUCHINSKY,
Chicago, Ill.

DEAR MR. TUCHINSKY: This is in response to your letter of December 21, 1971, in which you commented on our recently issued Letter to All State Directors (00-43), which places certain restrictions upon the rights of registrants to use tape recorders, and requested our opinion in the form of two questions as to our authority to do so. In view of the present status of the law and with respect to verbatim transcriptions of local or appeal board meetings we do not believe it feasible to begin such a practice by authorizing the use of tape recorders at the registrant's personal appearances. Our conclusion in this matter is supported by two reasons.

First, existing regulations and case law clearly indicate that neither a verbatim written transcript nor a tape recorded transcript of local board meetings is required.

Title 32 C.F.R., section 1624.2(b) requires only that information presented by the registrant "... if oral, shall be summarized in writing by the registrant and ... shall be placed in the registrant's file." (emphasis supplied) Title 32 C.F.R., section 1623.1 (2) further states, "... oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file." Title 32 C.F.R., section 1626.13(a) states, "If any information considered by the local board does not appear in the written information in the file, other than information presented orally by the registrant or in his behalf at a personal appearance ... the local board shall prepare and place in the file a written summary of such information."

The Seventh Circuit Court of Appeals, reading the foregoing regulations together, has concluded that they "... in effect preclude the local board from inserting a registrant's file information presented orally by the registrant or in his behalf at a personal appearance ..." *U.S. v. Fisher*, 442 F.2d 109 (1971).

The second reason for not using verbatim transcripts of local board meetings is that such transcripts would invite a review of the mental processes of board members in classifying registrants. To the present time, courts have refused to consider evidence involving the mental processes of board members.

This view was affirmed most recently in the Ninth Circuit in the case of *U.S. v. Lloud*, 431 F.2d 160 (1971). In the *Lloud* case the court observed:

"... Congress did not authorize the defendant to try the members of the board by ... examining them about their mental processes in arriving at their decision."

This view has been generally accepted by the courts, *Camp v. U.S.*, 413 F.2d 419, 5th Circuit (1969); *U.S. v. Beere*, Cr. No. 12283, U.S.D.C. Conn. (1969), Affirmed, Per Curiam, —F.2d—, 2d Circuit (1969); *U.S. v. Sasevic*, 117 F. Supp. 371, S.D.N.Y. (1953), reversed on other grounds; *U.S. v. Glessing*, 11 F.R.D. 501 (D. Minn. 1951).

In specific response to your inquiry as to why the provisions of our Letter to All State Directors (00-43) has not been published for public comment 30 days before going into effect, it is our position that the letter in question is not in the nature of regulation which is contemplated by the provisions of section 13(b) of the Military Selective Service Act.

You will recall that President Truman promulgated Selective Service Regulations by Executive Order in the summer of 1948. Thereafter, and for 23 years in which amendments to existing regulations or additional regulations were promulgated, the term regulations has had a precise meaning. That is, the word was used as denoting Presidential regulations or regulations issued

by the Director of Selective Service pursuant to Executive Order 9979 (July 22, 1948). Accordingly, it must be presumed that the Congress, when it amended section 13(b) of the Military Selective Service Act, did so with this historical reference in mind.

In view of the preciseness with which the members of the Senate and the staffs available to them developed the language in Public Law 92-129, it is unreasonable to believe that the Congress intended the requirement as you stated it. For this reason, it is our position that only changes to those regulations heretofore issued by the President and regulations issued by the Director pursuant to Executive Order 9979 or pursuant to section 6(j) of the Military Selective Service Act, must be published in the Federal Register 30 days in advance of the date on which they become effective and subject to public comment.

In further support of the position we have taken in this matter, your attention is invited to the Congressional record for June 17, 1971, which contains an exchange of comments between Senator Stennis and Senator Kennedy which we feel also tends to be supportive of our position in this matter.

We hope that we have been of assistance to you in our response to your inquiry.

Sincerely,

WALTER H. MORSE,
General Counsel.

IDENTICAL LETTER SENT TO ALL STATE DIRECTORS

FEBRUARY 9, 1972.

Mr. FELIX R. PETREY,
State Director, Selective Service System,
Montgomery, Ala.

DEAR MR. PETREY: Many state directors have expressed concern about the application of paragraph 5(b) in our Letter to All State Directors (09-53) dated January 11, 1972. In that letter, we provided for a uniform method of placing all registrants who are in Extended Priority Subgroup A into the Second Priority Selection Group at the expiration of a 270-day period beginning July 1, 1971. The pertinent sentence in that paragraph reads: "For registrants in Subgroup A, any of that time which is prior to July 1, 1971, and the time from July 1, 1971, until the date the revised Parts 1624 and 1626 of the Selective Service Regulations will become effective, shall count toward the 270 days of consecutive availability."

The intent of paragraph 5(b) was that all people who are in Subgroup A, regardless of when they became available for call, should receive credit for the 270-day period beginning July 1, 1971. Those who became available before July first began to accumulate credit on the date of availability. This intent has been misunderstood, and part of the purpose of this letter is to clarify that intention.

We now must face another problem, which relates to those members of Subgroup A in the Extended Priority Selection Group who still are on delays owing to personal appearances and pending appeals. If they were aware of this procedure, and we could make it possible for them to give up their rights for personal appearances or appeals, they could take advantage of the 270-day period and their liability in Extended Priority would terminate late in March.

I know that many state directors feel that these men, who have delayed induction in every way possible and have attempted to frustrate both the system and some of us, should be required to serve. I recognize that it disturbs some of our people when it becomes possible for this type of person to avoid service. But on the other hand, the Department of Defense probably will ask for us to induct very few people in the months ahead. The Army would rather work with younger men who have a willingness to serve. Furthermore, Selective Service would be much better off to deal with younger men and to permit some of those recalcitrant persons to become eligible for classification into Second Priority.

Accordingly, we have decided that we should contact all men in Extended Priority Subgroup A to notify them that they may withdraw their requests for personal appearances and appeals, and thereby enter the Second Priority Selection Group at the end of the 270-day period beginning July 1, 1971. Attached is a letter which I recommend that you send to all registrants in Extended Priority Subgroup A who currently have personal appearances and appeals pending. Obviously these letters must be mailed promptly in view of the time element.

I solicit your cooperation in this matter. I am convinced that if we handle this matter in the way I have suggested, we in Selective Service, the Army, and the nation as a whole will be better served.

Sincerely,

CURTIS W. TARR.

Attachment.

RECOMMENDED LETTER TO REGISTRANTS

A review of your selective service file indicates that you are currently in the Extended Priority Selection Group, Subgroup A, and that you have pending a request for a personal appearance and/or an appeal.

Due to circumstances beyond your control, your request for such personal appearance or appeal could not be expeditiously handled, and therefore it is recommended that you give serious consideration to writing your local board and advising them that you desire to withdraw such request for a personal appearance or appeal.

We feel that this action will be in your best interests, because you will be placed in the Second Priority Selection Group, which is a lower group, on March 26, 1972, thereby making you less vulnerable for induction into the armed forces. Such a letter should be received by your local board not later than March 20, 1972.

Inquiries with regard to the policy on prime exposure to induction or alternate service should be addressed to _____, the State Director, at _____¹
(address)

¹ NOTE: Recommend the statement to this effect in order that explanations on the basis of policy can be provided from the State Director's office. Inasmuch as so many of the records will be in appeal board files as opposed to local board files, if a proper address for inquiry is not reflected in the letter undue confusion in correspondence is likely to exist at the local board level.

Senator KENNEDY. Well, I want to thank all of you gentlemen very much. We have covered in considerable detail the rather technical provisions of the changes in the act and the fact that the Selective Service has failed to comply with congressional intent. I think you have given us a good deal of ammunition from the practical point of view and from your personal experience where there has been a failure by Selective Service to live up to the purpose of congressional action. I think it is enormously helpful to us in trying to see what can be done to alter and change these regulations. I want to thank all of you very much for your appearance here. It has been very helpful.

Our next witness is Mr. Wilson.

STATEMENT OF WILLIAM K. WILSON

Mr. WILSON. Mr. Chairman, I was invited by the committee to relate to the committee my personal experience as related to the conscientious objector civilian work area.

I will just briefly outline the activities and experience I have had. Back in March of 1970 I received my conscientious objector classification and along with that an order to seek employment in terms of civilian work.

I attempted to do that immediately within the period of time specified in which to do so. I had gotten employment with the American Friends Service Committee after having come to Elizabeth, N.J. and leaving a previous employment with the New York City Family Court System.

After I had received the assignment to work I notified the local board of the assignment and the local board sent me a letter indi-

cating the fact that this assignment was not acceptable to which I then wrote to them requesting reasons as to why such an assignment was not acceptable or inappropriate as they termed it.

In the letter which they sent me they indicated the fact that they concurred with the New Jersey headquarters of Selective Service, the State in which the project was located, and they were advised that the assignment was inappropriate. They failed to indicate the reasons why. I had also requested that the local board consider the previously suggested areas of employment in which I could be placed.

They responded by sending a letter with three outlined areas of work and the first area of work was in highway work; the second, hospital work; the third, farm work. I found the work to be inappropriate in all three areas and notified the local board that I felt uncomfortable at that time in accepting any one of the assignments and also requested at the same time that they give some kind of reasons as to why the American Friends Service Committee was inappropriate as they termed it.

Later on a meeting was set up, a meeting of the registrant, the local board and a state representative of Selective Service.

Senator KENNEDY. Let me ask you if I understand you correctly. What were you doing previously?

Mr. WILSON. Before when?

Senator KENNEDY. When you received your notification?

Mr. WILSON. I was working in the New York City family courts as a social worker.

Mr. KENNEDY. Doing what sort of work?

Mr. WILSON. Work with juveniles, planning the disposition of cases and so on.

Senator KENNEDY. And how long were you doing that?

Mr. WILSON. For approximately a year and a half.

Senator KENNEDY. Working with juveniles that had some kind of trouble with the law, is that right? You would counsel them and work with them?

Mr. WILSON. That is right.

Senator KENNEDY. And then when you were doing this work you got your notification, is that right?

Mr. WILSON. Yes.

Senator KENNEDY. And you counseled with the Friends?

Mr. WILSON. Right.

Senator KENNEDY. And as I understand it, the Selective Service gave you three different alternatives of work to do, is that right?

Mr. WILSON. That is right.

Senator KENNEDY. It could be farm laborer?

Mr. WILSON. Yes.

Senator KENNEDY. Highway work or hospital work?

Mr. WILSON. Yes.

Senator KENNEDY. They were taking you out of this counseling work?

Mr. WILSON. That's right.

Senator KENNEDY. That you do and you were able to do and were doing a good job of?

Mr. WILSON. According to my evaluation anyway. And then after

I had received these assignments, like I said. I had turned them down because I did not feel comfortable and plus the fact that the local board had not guided me in job selection by answering why the AFSC was inappropriate.

Senator KENNEDY. Before you worked in the hospital situation in New York, what had you been doing before that?

Mr. WILSON. You mean the New York City Family Courts. I was working with VISTA.

Senator KENNEDY. What were you doing with VISTA?

Mr. WILSON. Basically community organizing.

Senator KENNEDY. Where?

Mr. WILSON. New York City.

Senator KENNEDY. How long did you work with VISTA?

Mr. WILSON. Approximately two years.

Senator KENNEDY. Your work from what you have said here was basically in community action or the area of social concern, was it not?

You had been working with juveniles who had some difficulties with the law. You worked as a VISTA volunteer?

Mr. WILSON. Yes.

Senator KENNEDY. You worked also in some relocation programs in trying to assist people whose houses had been torn down?

Mr. WILSON. Yes.

Senator KENNEDY. You worked in this area and in your record was this history of public service. This was well understood or well documented, but yet when you were attempting to gain a conscientious objector position, the alternatives that were given to you were mostly menial. I would think that is an understatement, don't you?

Mr. WILSON. That was my impression of the three choices and I tried to inform the local board of the fact that I was uncomfortable in all of them. We set up a meeting with the local board and the State representative.

Senator KENNEDY. Now, you are in the process of appealing that now?

Mr. WILSON. Yes, the case has since been to the general counsel's office in national headquarters and also to Dr. Tarr's office too and I have not received any relief from those offices. I am presently faced with the possibility of an indictment.

Senator KENNEDY. What kind of work would you be doing on the highways do you imagine?

Mr. WILSON. Well, according to the personnel director after having reported in compliance with the work order that was sent to me—

Senator KENNEDY. That was when you were assigned work in the highways?

Mr. WILSON. Yes. The position was that of a maintenance helper and the duties entailed such things as road patching, picking-up and dumping trash.

Senator KENNEDY. Road patching and dumping trash?

Mr. WILSON. Yes; after having spoken to the personnel director I did not feel that the assignment was truly meaningful or relevant to the priority of national interests.

Senator KENNEDY. Is this in the State of Virginia?

Mr. WILSON. Yes.

Senator KENNEDY. Who else does that kind of roadwork in Virginia?

Mr. WILSON. Well, as far as I know prison laborers are responsible.

Senator KENNEDY. Prison laborers?

Mr. WILSON. Right, and I feel this was punitive.

Senator KENNEDY. And that is the reason you are appealing? Would you have welcomed the opportunity to continue in the counseling work that you had been involved in in New Jersey?

Mr. WILSON. I feel that this type of work would be meaningful and relevant and in the national interest, especially at this time and age, and would be more appropriate and as such, I would certainly feel more comfortable in serving in that capacity. Plus, I felt that hopefully they could utilize what skills or abilities that I had just as they would do if I entered the military. Naturally they would be interested in the type of ability of a soldier in making assignments.

Senator KENNEDY. I think the point you made was made very clearly. Obviously the kind of work you were skilled to do was a great deal different than that of a road operator.

Your record and experience and involvement in trying to help and assist people is well documented. I think your case dramatizes in a personal way the dilemma which I am sure thousands of young people are faced with. I want to thank you very much for coming.

Mr. WILSON. Thanks for the opportunity of allowing me to come.

Senator KENNEDY. Our next panel consists of Conrad Brunk, National Interreligious Service Board for Conscientious Objectors; Bela Silard, American Ethical Union; Mr. Arlo Tatum, Central Committee for Conscientious Objectors.

I want to say first, gentlemen, I am going to have to conclude this just a little before 5 o'clock.

STATEMENT OF CONRAD BRUNK, NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS

Mr. BRUNK. Thank you. I have a prepared statement which I will submit for the record and I will make only a few comments since some of the points covered in my statement have already been discussed by other witnesses today.

I am Conrad Brunk, assistant director of the National Interreligious Service Board for Conscientious Objectors. Our organization was involved in 1940 with the setting up of the civilian work program and we have been working very closely with conscientious objectors since 1940 and have, I think, a very good understanding of the way in which the system has functioned in the past and is functioning now. On the basis of that background there are a few comments I would like to make.

Mr. Karpatkin has already mentioned this afternoon the failure of the regulations to implement the requirement that the director supervise the alternate service program. This amendment to the law we had largely welcomed because we felt it would take care of many of the abuses like those you have just heard with Mr. Wilson's case.

That is just one case in many that we get in our files every day of registrants being subjected to local prejudices.

I personally am from the same area that Mr. Wilson is from and I know many conscientious objectors from that same area who have been assigned to much more meaningful jobs, like those Mr. Wilson proposed. But Mr. Wilson's board chose to apply a strict, disruptive standard to him which is not applied to other conscientious objectors in the same community.

We had hoped that the requirement in the law that the Director administer the work program would remedy this situation but as Mr. Karpatkin pointed out, the Director has redelegated this authority back to the State directors with one exception, not allowing for the review of any decisions made by a State director. I was happy to see this morning that Dr. Tarr said he was going to supervise very closely the actions of these State directors in their administration of this civilian work program but what concerns us is the fact that this could easily be and should be, incorporated into the regulations.

Registrants should be given the right to appeal from decisions made by the State directors. Mr. Wilson should be able to get some kind of a decision from the State director in his case because the Director can see the kind of discrimination and local prejudices involved.

But registrants are not informed of this right to appeal to the national Director. It was never mentioned in the regulations or in the registrants' processing manual or letters to State directors that a registrant has this kind of right to review by the national Director.

There are several instances in which this review is precluded. For example, the State director has the right to determine at any time when a man is on the job that his job is no longer appropriate, and without any notification to him, without any reasons other than the fact that he doesn't think the job is any longer in the national interest, he can transfer this man to another job. There is no provision for him to appeal this decision to the National Director. He is subject to the decision of the State director entirely.

If the registrant volunteers for a civilian work position and the State director denies the job that he submits, he cannot appeal that decision to the National Director. If he submits up to three jobs that have been denied by the State director and the National Director during the 60 days which he has, the State director is then authorized to issue a mandatory work order to this man to a job of his own choosing.

This mandatory work order is not reviewable by the National Director, at least the regulations make no provision for a review. This is a drawback position even from the old regulations under the 1967 Law which put the power to supervise the civilian work program in the hands of the local board, but the regulations still required that a mandatory work assignment against the registrant's will be reviewed and approved by the National Director.

Now that the law requires the National Director to supervise the work program, the regulations have changed so that the Director doesn't even have to review the issuance of a mandatory work order.

This is also the case with a man who is requesting early release from the 1-W work program on a bonafide ground such as physical disability, hardship, or other reasons which would qualify him for early release.

The Director used to make this decision under the old law which didn't require him to do so, but now that the law requires the Director to supervise the program, the Director no longer makes the decision. So the point that we are making is why not inform the registrant that he has the right to appeal if in fact the law requires that the National Director make the final decision? This is the point we have tried to make again and again in our own responses to the republished regulations.

Only the man who has access to draft counseling, the man who is in college and has access to draft counseling centers and so on finds out that he has these rights. Selective Service isn't telling him through its regulations or any other directive.

Senator KENNEDY. How about that wonderful regulation that lets the registrant come in and permits the actual inductor to sign his name. That is a wonderful rule that we have particularly in the case of Spanish speaking people and other minorities. Southeastern Massachusetts has a heavy Portuguese immigration population coming in so you get a fellow who comes in, speaking very little English, and the inductor is such a good friend of his that they sign his name for him and you are really taken care of I guess under those circumstances.

Mr. BRUNK. As an example of what seems to be a deliberate attempt to keep people unaware of their rights, when the first public information pamphlet was published last summer by Selective Service, these pamphlets were to be distributed to the registrants to inform them of their rights and responsibilities. The 1-O classification was never mentioned as an available classification in these pamphlets explanation of the lottery system. These pamphlets usually indicated that a man could be drafted only if he was in class 1-A, even though in fact a man can be drafted from class 1-A-O and 1-O as well. We suggested that this be corrected to include 1-A-O and 1-O classes and the response was at that time that when we put these classifications 1-A-O and 1-O before the registrants, they start asking questions about what they are and are not entitled to.

Senator KENNEDY. What about the new form 150?

Mr. BRUNK. Concerning the new form 150, I have attached an interesting comprehension study of this by Mr. Michael C. Brophy and Mr. Marc Mayerhoff of the University of Wisconsin—Milwaukee, which showed that the present form 150 tested out to at least high school graduate level comprehension by one test formula, the Fry formula, and to college level comprehension by the other, the Dale-Chall formula. The recently proposed form 150, however, tested out at a college graduate level by the Dale-Chall formula, and a college level by the Fry Formula.

In other words, the Dale-Chall formula showed that the form 150 in order to be understood would have to read by a person with a comprehension level of a college graduate. The Fry formula, which

uses several different standards of measurements, is not quite as tough. It showed that the proposed form 150 required at least a college junior level of comprehension, not in order to answer the questions, but to just understand them.

This is an example of the conscientious objector provision really being reserved for the educated and articulate person. For instance, if you take a man who is not a traditional religious conscientious objector who feels on the basis of nonreligious grounds he is opposed to participation in a war, this man, in my opinion, if he tries to file a conscientious objector claim, is running up against almost impossible odds because he just does not know the kind of philosophy and moral and ethical vocabulary that is in fact required to fit himself into the framework that is set up for him by the form 150 and by LBM 107.

I think Mr. Silard will comment on this problem. I wanted to point other things that are amiss with the Selective Service program. Although Congress has required that reasons be given for denial of any adverse claim to a registrant by local boards and appeal boards, there is no requirement that reasons be given for the denial of alternative service positions.

Mr. Wilson's case is a case in point. He was never given any reason why his job in the American Friends Service Committee was not appropriate. Very seldom is a man given a reason.

In addition to this the Director has never spelled out any criteria of what is appropriate civilian work. The new regulation, for example, do not specify what types of jobs are in the national interest. They specify the types of employers. You must either work for a Government agency or a nonprofit private agency or in a job at a profit-making agency that does not itself involve any profit making.

It next tells you what kind of employers are appropriate but nowhere in the regulations does it tell you what kind of jobs are appropriate. The only regulation which makes an attempt, which is 1660.6(a)(1), says the job must fulfill the specifications of the law and regulations.

Now, that is the definition of appropriate work. It doesn't help local boards and State directors very much in term of knowing whether or not a job is appropriate. I would like to call your attention to a case which we feel is one of the most incredible that we have come across in the alternate service program and it involves all of these points I have been talking about.

This is the case of Walter Cook, a Missouri registrant whose conviction was reversed last July by the 8th Circuit Court of Appeals with the following statement: "If the Selective Service intends to prosecute young men for failure to perform their obligation to perform civilian service, we think in light of due process requirements that the Selective Service System must adopt well-defined administrative rules and regulations which articulate the standards of required performance and provide for appropriate notice of violations of those standards."

This relates to the point Mr. Karpatkin made about the fact that the employer can decide that a man is not meeting the standards of the job and there are no standards of performance outlined.

Now, Mr. Cook was ordered in 1965 to perform civilian work. He complied with the order. He was transferred from his first job because he felt he could not work on Saturdays due to the fact that he was affiliated with the Worldwide Church of God and their Sabbath was on Saturday and this did not fit into the employer's scheme of things. So he was transferred to another job.

At this time he developed, or the job aggravated, a congenital back disability, a condition which was at the time a disqualifying condition under Army regulations and still is a condition for which one must be released from the Armed Forces. He stopped his job because he was taking treatments from an osteopath for this condition and the osteopath recommended that he be given a sedentary job. However he was employed at the University of Missouri College of Agriculture and given a job as a janitor.

He could not perform the work because of his worsening back condition and at this time he was receiving total disability payments from the John Hancock Insurance Co., and one other insurance company. They ruled him to be totally disabled. He had been refused employment when he was seeking alternate service with the Civil Service Commission who rejected him because their doctors found and put in his file letters stating that he was disabled and unable to perform any work which the Civil Service Commission had for him in the Post Office Department.

But despite this, he was prosecuted for "failure to perform satisfactorily," he was convicted by a jury in the District Court of Missouri, and the decision was overturned by the 8th Circuit Court. After 7 years this man is still in class 1-W, and just recently the State director has ordered him back to work to finish up this alternate service work.

His case is now at national headquarters of Selective Service. We are asking the National Director to intervene and release this man. For the past 5 years he has not been able to get a job because of his draft status. So far the Director has refused to release Cook from his new order to work.

It should be pointed out that new regulations do not even authorize the Director to release that man now as the old regulations did. They do not even require the State director to release him, regardless of his physical condition.

I will submit the remainder of my concerns to the record in my prepared statement.

Senator KENNEDY. We will make sure that your statement is put in the record.

The next witness is Mr. Bela Silard, American Ethical Union.

(The prepared statement of Conrad Brunk follows:)

STATEMENT OF CONRAD G. BRUNK, ASSISTANT DIRECTOR OF THE NATIONAL INTER-RELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS, BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY, U.S. SENATE

In response to your request for our observations on the present administrative practices and policies of the Selective Service System, there are several concerns which we would like to submit to the Subcommittee for its consideration. The National Interreligious Service Board for Conscientious Objectors was founded in 1940 as the National Service Board for Religious

Objectors to represent the interests of conscientious objectors who were faced with the 1940 conscription law. Our agency was closely involved with the establishment by the Congress of the civilian work program for conscientious objectors opposed to both combatant and noncombatant service in the armed forces. Since that time we have aided conscientious objectors as a counseling agency, and we have been closely associated with the civilian work program as it has been administered by Selective Service. We publish the *Guide to Alternative Service*, which has been a source of job information for thousands of COs seeking alternate service positions. We have observed at close hand the operation of the Selective Service System through the past 30 years.

Our observations are limited to four basic areas: A. The newly issued and proposed regulations governing the alternate service program and Congressional intent; B. The new alternate service regulations and due process; C. The present administration of the alternate service program; and D. The Proposed Form 150 for conscientious objectors.

A. THE NEWLY ISSUED AND PROPOSED ALTERNATE SERVICE REGULATIONS [32 CFR 1660] FAIL TO IMPLEMENT THE DESIRE OF CONGRESS THAT THE DIRECTOR ADMINISTER AND SUPERVISE THE ALTERNATE SERVICE PROGRAM FOR CONSCIENTIOUS OBJECTORS

In 1971 Congress amended the conscientious objector provision of the draft law [Section 6(j)] to remove the responsibility for the civilian work program from local boards and to place it in the hands of the Director of Selective Service. The Conference Report indicates that the rationale for this amendment was that the Director was in a much better position to determine national needs which could best be served by conscientious objectors in alternate service [*Conf. Rep. No. 92-433, p. 21*].

NISBCO in large part welcomed this change in the law, because it promised an end to the wide discrepancies among states and among local boards in their standards of appropriate civilian work. One of the greatest inequities of the civilian work program in the past has been that one local board or State director might have a relatively liberal policy of job approval, allowing COs in that jurisdiction to choose from a variety of jobs, while the registrant from another local board or state had to face a highly restrictive approval standard—often a choice only from among 3 or 4 state health institutions. The attached Exhibit A compares the civilian work policies of the State of Missouri with those of New York City, as outlined in their respective bulletins to local boards.

This policy of unequal treatment of COs is encouraged by the still effective Local Board Memorandum 98, which instructs local boards to "consider work assignments on an individual case basis so that an assignment to a particular job for one registrant does not bind his local board or other local boards to approve a similar job for another registrant."

The effect of this policy of local discretion was to subject CO registrants to all forms of local prejudices and abuses which the Director of Selective Service was powerless to correct, because the old law gave this power to local boards. The Virginia registrant who has already presented his case to the Subcommittee serves as an excellent example of this this kind of abuse. Here is a man who, even though he has been working in jobs undeniably contributory to the national interest for the past five years, is facing possible prosecution because a local board in Virginia determined that this college graduate could best serve the national interest picking up litter on a road gang rather than locating housing for inner-city residents or teaching in an urban Headstart program. I personally know other conscientious objectors from the same area who have had jobs such as these latter ones approved with no problem. This case is not an isolated one in Selective Service.

The recent amendment to the civilian work provision of the Act sought to end this kind of inequity in the administration of alternate service by empowering the Director to establish uniform standards of appropriate work. However, the regulations which the Director has now implemented and proposed virtually negate this reform of the law by Congress, insofar as they delegate the responsibility given to the Director by Congress back to the local State directors, with very little power of review retained for the Director. In fact, the new regulations reserve less power of review of the alternate service program for the Director than did the regulations issued under the 1967 law which had no such requirement. The new regulations do not provide

for review of decisions by State directors in alternate service matters except where a registrant submits his own job proposals within the 60-day period following his notification that he must find alternate service work. The registrant whose proposals are denied by the State director may request a review by the Director of this denial in no more than three job proposals. But, beyond this initial review, the new regulations do not provide for a review of any other discretionary decision made by State directors. These decisions include the following:

1. The decision by a State director to deny a registrant's proposal for civilian work as a volunteer [1660.3]. No appeal to the Director.

2. The issuance of a mandatory work order to a job of the State director's own choosing (after the registrant's own proposals have been denied) is not reviewable by the Director [1660.7(c) & (e)]. Even the regulations issued under the 1967 law demanded that the Director approve any mandatory order to a job not acceptable to the registrant. But under the new regulations there is no provision for appealing a mandatory job assignment which may be in violation of the official criteria.

3. A State director's transfer order to a new job when the 1-W's first job terminates through no fault of his own is not reviewable by the Director [1660.9(c)]. Neither is the registrant given the chance to look for a job of his own choosing when he finds himself in this situation.

4. The denial of a request from the registrant to transfer to another job is not reviewable by the Director [proposed 1660.7(g)].

5. The State director's denial of a request for an early release on grounds of hardship, medical disability, or other bona fide reasons is not reviewable by the Director [1660.10]. The regulations implementing the 1967 law, however, required that the Director make this determination.

6. The proposed regulation 1660.9(d) allows the State director to reassign a 1-W registrant to another job "at any time that he determines the original job ceases to be acceptable as alternate service. . . ." with no review of this decision by the Director. This regulation, proposed in the January 12 pre-publication, would have the effect of nullifying the one instance in which review by the Director of Selective Service is provided for. Under this proposal, a man could be assigned to a job which the Director had approved over the objections of the State director, only to be transferred to another job afterward by the State director, who never thought the job should have been approved originally.

The effect of the new alternate service regulations will be to preserve all of the possibilities of inconsistency and inequality which existed under the old regulations, and which Congress sought to remedy by the amendment to Section 6(j) of the Act. What Congress sought to accomplish, the Director has thwarted with regulations.

In response to our protests on this matter of review by the Director, Selective Service officials have said that the right to a review by the Director is implicit in the regulations, since the Act does require the Director to supervise the civilian work program, and the Director would, in fact, review any appeal made by registrants from the decision of a State director. If Selective Service agrees that the statutory right to review exists, why does it fail to inform registrants of this right by making no reference to it in the regulations? As so often happens in the administration of Selective Service, only the counseled registrant is aware of the rights which are lawfully his, while the uncounseled (who is by far in the majority) remains ignorant. It is time for Selective Service registrants to be informed of their rights by Selective Service Forms and Regulations. The pre-publication requirement passed by the Congress should help accomplish this end, but only if Selective Service cooperates by spelling out substantive rights and responsibilities in pre-published materials.

B. THE NEW ALTERNATE SERVICE REGULATIONS DO NOT PROVIDE EQUAL PROTECTION AND DUE PROCESS OF LAW IN SEVERAL CRUCIAL AREAS

1. Part 1660.6 provides that although normally a conscientious objector should be assigned to a job which would provide a standard of living "reasonably comparable to the standard of living the same man would have enjoyed had he gone into the service," this requirement can be waived by the State director "when such action is deemed to be in the national interest and would speed the placement of registrants in alternate service." This provision allows a

man to be assigned to a job at subsistence or lower pay which is far below that received by servicemen in the armed forces under the new pay scale. At the present time, conscientious objectors are receiving mandatory work orders to the California Ecology Corps where they must work for less than the minimum wage (they are presently receiving \$40.00 per month plus room and board). Ecology Corps 1-W workers are not given any allowances for support of dependents, nor are they provided with room and board. In addition, non-CO volunteers presently working in the Ecology Corps are receiving \$377 per month for the same work as is done by the conscientious objectors. This is merely one example of the possibilities which exist to use conscientious objectors as a source of "cheap labor." The regulations should guarantee conscientious objectors the right to adequate compensation unless they volunteer for lower paying jobs.

2. Although the Selective Service Law now requires that reasons for all decisions adverse to the claim of a registrant be given by local boards and appeal boards, the regulations do not afford conscientious objectors this right with respect to any denial of his alternate service proposals made by a State director or the National Director. The statute requires that the Director determine what jobs or types of jobs are appropriate for alternate service. Fairness requires that these criteria be spelled out so that a conscientious objector has some notion of the kind of job he is required to look for, and he is entitled to valid reasons when the proposals he submits for approval are denied.

It should be pointed out that the criteria for appropriate civilian work outlined in the regulations [1660.5 & 6] are not definitive of the kinds of jobs which the Director determines to be in the national interest. Part 1660.6(a) (1), which purports to define "national health, safety, or interest," reads in its entirety as follows: "The job must fulfill specifications of the law and regulations." Neither the law nor the regulations, however, contain any further specifications. The conscientious objector seeking appropriate alternate service is left to the mercy of the passing whim of a State director. Neither he nor the State director is given a clear standard of appropriate work, and the registrant will never know why the job or jobs which he submits after two months of searching were rejected, since the regulations entitle him to no reasons whatsoever.

The delinquency provision of the new alternate service regulations [Part 1660.8 & 9] is a frightening prospect for any conscientious objector who encounters normal on-the-job difficulties. This provision states that any 1-W registrant who fails to "comply with reasonable requirements of an employer shall be deemed to have knowingly failed or neglected to perform a duty required of him under the Military Selective Service Act." By the terms of this regulation, a man is *presumed to be guilty of a felony* if he fails to meet "standards of performance demanded by the employer of his other employees in similar jobs." It defines as criminal a man's inability to perform certain tasks which others may be able to perform with ease—tasks to which he may have been assigned against his will.

Under this regulation the employer becomes, in effect, a policeman and prosecutor. Mere incompetence, personality conflicts, or other normal employer-employee difficulties could lead to prosecution at the hands of overzealous or unsympathetic employers. A registrant who is willing and able to continue under the work program in another assignment should not be prosecuted. The delinquency sections of these regulations do not even so much as afford the registrant a personal hearing with the State director before a determination to prosecute is made. The State director makes the final decision to report the registrant for prosecution, and the registrant is given no right of appeal to the National Director from this decision. Here again, even the old regulations required the Director to make all prospective determinations of 1-W registrants. This regulation should be revised to encourage the working out of on-the-job problems short of resort to criminal prosecution. In any event, Selective Service needs to articulate the standards of performance for conscientious objectors more clearly.

Just recently the Eighth Circuit Court of Appeals reversed the conviction of a 1-W registrant precisely on these grounds. The court said, "If the Selective Service intends to prosecute young men for failure to perform their obligation to perform civilian service, we think, in light of due process requirements, the Selective Service System must adopt well defined administrative rules and regulations which articulate the standards of required perform-

ance and provide for appropriate notice of violations of those standards." [U.S. v. Cook, 8 Cir. July, 1971]. This case involves one of the most flagrant miscarriages of justice our organization has encountered in the alternate service program. Cook was ordered to perform work after volunteering in early 1965 at his Missouri local board. He left his job at the Missouri University College of Agriculture because of a congenital back disability which was aggravated by the janitorial work to which he was assigned. Despite letters from Doctors of Osteopathy certifying that he should not be required to perform anything but sedentary work, and should be subjected to weekly treatments and be fitted with a back brace; despite the fact that he had been refused employment by the Civil Service Commission to which he had applied for alternate service, on the grounds that he was physically unfit; and despite the fact that Cook was receiving total disability benefits from the John Hancock Insurance Co during this period, he was reported for prosecution, was convicted by a jury in the district court, and has now been acquitted. Cook has now been held in Class 1-W for nearly 7 years, and now that he has been acquitted, the Selective Service System has informed him that he must find work to complete his alternate service obligation. For the past five years, Cook has been unable to get a job because of his pending draft status.

C. PRESENT ADMINISTRATION OF THE ALTERNATE SERVICE PROGRAM

In the past two years, conscientious objectors have been subjected to unprecedented delays and harassment from the Selective Service System in receiving their assignments to alternate service. Last year Selective Service officials reported that they had accumulated a backlog of over 6,000 conscientious objectors whose numbers had been reached in the order of call, but for whom no jobs had been found and approved. There were several factors contributing to this state of affairs. One was the general employment picture in the country, which makes it difficult to find any job, to say nothing of a job which qualifies for alternate service. There was also an increase in the number of conscientious objector registrants during this period, although Selective Service reported in its February, 1971 issue of *Selective Service News* that this was only a "gradual" increase. But, the most significant factor in the buildup of this backlog of COs seeking work was the refusal of Selective Service to approve many reasonable job offers made by these registrants. An Illinois board recently refused to approve a job with an Elkhart, Indiana county school for retarded children as a teachers' aid because, in the words of the board, the registrant "should not be allowed to have a position that might influence any young Americans."* *The New York Times* carried a story on December 23, 1970, of a New York State conscientious objector who was not allowed to continue work as a "group parent" to 17 boys in a home for neglected children in Bedford-Stuyvesant because the job was less than 50 miles from his home (it was 45 miles).

Cases like these are no exceptions in the alternate service program. Some State directors do not approve jobs outside their states, and some limit approval to state health institutions. Some do not approve any civil service jobs. The newly issued regulations prohibit any job which interferes with the competitive labor market. As a result of these restrictive and unauthorized policies of job approval, hundreds of conscientious objectors have had their job assignments delayed for over 18 months, and some have been delayed longer. By the time these men are finally ordered to work and complete 24 months on the job, their lives will have been disrupted by Selective Service for nearly four years, rather than the two years which the law requires of them.

A further reason for the delay in the assigning of these men to alternate service has been Selective Service's own failure to effect regulations following the passage of the draft bill in September. The first regulations did not become effective until December 10, 1971, and proposed changes issued in January 12, 1972, still have not been made effective. In our opinion, the Selective Service System itself bears the responsibility for the thousands of unplaced conscientious objectors who continue to be held in limbo.

* After trying for over a year to negotiate an acceptable job with Selective Service, with no success, this young man and his wife fled to Canada to begin a new life. They could no longer withstand the pressures and costs of job hunting for so many months.

To the astonishment of the conscientious objector community Selective Service has now chosen to alleviate this backlog of COs by ordering them to perform work at a time when no 1-A or 1-A-O registrants are being inducted into the armed forces. The attached SSS directives [Letters to All State Directors 00-51, 00-51 (amended), 00-53, Personal Letter to State Directors of February 9, 1972, and Temporary Instructions 660-1 and 632-1] show that Selective Service has established a special order of call for 1-O conscientious objectors, even though their 1-A and 1-A-O counterparts who were not inducted into the armed forces in 1971 because of the same delays, are being freed from the draft by entering lower priority groups. The news media have been announcing the Selective Service decision to cancel induction orders of men whose inductions were delayed or postponed, and to release almost every registrant in Extended Priority because there are no draft calls in the first quarter of 1972. But 1-O conscientious objectors have been shocked to find notices in their mail boxes that they have 60 days to find a job for alternate service. This special order of call [established entirely by directives not publicly published or pre-published] seems to violate the requirement of the law and the regulations that 1-Os be ordered to work only "in lieu of induction" [Act, Sec. 6(j)] and not "before registrants with his RSN who are classified 1-A or 1-A-O are ordered for induction" [Reg. 1660.4(a)].

D. THE PROPOSED FORM 150 FOR CONSCIENTIOUS OBJECTORS

On January 12, 1972, the Director pre-published for comment in the *Federal Register*, a proposed new form for conscientious objector claims, SSS Form 150. This proposed Form 150, as well as the Special Form for Conscientious Objectors presently in use, illustrates what has always been one of the most discriminatory characteristics of the CO classification process. This is the undeniable fact that the CO exemption tends to be a privilege afforded to the educated, articulate, and aware registrant. At present, it is extremely difficult, if not well-nigh impossible, for a non-traditional moral or ethical objector to make a successful claim unless he is college educated. The less erudite individual has neither the vocabulary nor the understanding of moral or ethical philosophy to fit his claim into the Procrustean bed which the Form 150 and other Selective Service directives like LBM 107 demand.

Both the present and the proposed SSS Forms 150 were recently subjected to two separate readability formulas to test the reading level required to comprehend the questions on these forms. This study, done by Mr. Michael C. Brophy and Mr. Marc Mayerhoff of the University of Wisconsin-Milwaukee, showed that the present Form 150 tested out to at least high school graduate level by one test formula (Fry formula), and to college level comprehension by the other (Dale-Chall formula). The recently proposed Form 150, however, tested out at a college graduate level by the Dale-Chall formula, and a college level by the Fry formula. This study is attached as Exhibit C.

The fact that the comprehension level of the proposed new form is so high is especially alarming in view of the fact that with the new lottery system and the abolition of most deferments, registrants will be faced with the draft at a much earlier age, and will be required to make the decision about conscientious objection at an earlier age as well. As Mr. Brophy and Mr. Mayerhoff noted in their letter to the Deputy General Counsel of Selective Service, "It would appear that the authors of the proposed form operated under the bias that only men with the opportunity for a college education are competent to deal with this question [of conscientious objection to war]."

In conclusion, we suggest that the Selective Service System has not met the Congressional mandate to administer the draft with procedural fairness and due respect for the rights of individual registrants. At a time when draft calls have been extremely low and even non-existent, there is little excuse for the apparent shoddiness with which the Selective Service policies have been written and implemented. In all fairness to the administrators of the System, we concede that a completely equitable draft is an impossible ideal. Our 30 years of contact with the Selective Service System at its grass roots—the individual persons whom it touches—has convinced us that the only fair and equitable draft is no draft at all. We submit these criticisms with the belief that there is vast room for improvement in the administration of the draft, but also to underscore our continuing conviction that conscription has no place in our society.

STATEMENT OF BELA SILARD, AMERICAN ETHICAL UNION AND FELLOWSHIP OF ETHICAL PACIFISTS

Mr. SILARD. Mr. Chairman, I will not read my prepared statement. I will simply ask for your permission to file it with supporting material. Particularly, I would like to file, if you will permit me, the published results of two studies. Each of these took me a year's research.

One of these studies was on the invalidity of Selective Service rules for disrupting the lives of conscientious objectors who perform alternative service. Those rules were invented by General Hershey and are being largely continued by the present Director. In mentioning examples, I think I can do better than my friend Mr. Brunk here, with a beautiful case known as *Hackney v. Tarr*. The local board, on the basis of those disruption rules, said: This man cannot retain his job with the New York Hospital where he is an inhalation specialist because that would not disrupt his life. The boards' objection was that the young man's home is in New York City.

The second study which I just recently concluded has to do with the same local board memorandum No. 107 which you yourself mentioned today. I am not concerned here with the technical question of prepublication. I have been deeply concerned with the fact that the present Director has embarked on emasculating the Supreme Court's *Welsh* decision. In local board memorandum No. 107 he developed entirely illegal and invalid criteria of his own for ethical objectors. Although he conceded that religious, moral, and ethical objectors are all included, he has invented such special requirements for the moral-ethical objectors. Although he conceded that religious, moral, and ethical objectors are all included, he has invented such special requirements for the moral-ethical objector which are absolutely non-germane to his way of life and the manner of development of his beliefs. To give an example, those criteria require a showing of rigorous training, or training as rigorous as that of a traditional religionist. This is most absurd and—I am trying hard to use a generous term—plain silly.

This is all I want to say by way of highlights of my prepared statement; except, perhaps, one thing with respect to prepublication that none of the other witnesses seems to have mentioned. This is: that the Director is bound not only by the statute; he's also bound by the President's Executive order of October 12 of last year. The President went one step further than the statute. The statute says "regulations", but the President says "any rule or regulation".

Now, this little word "rule", means something that is very important. I have not read Mr. Erickson's letter mentioned by another witness, but I would think that the idea that only what the Selective Service chooses to call a regulation need be prepublished, and anything else, although it is substantive but is not called a regulation, need not be prepublished, misses the point. The question of what is a "rule" has been judicially resolved by the court of appeals here in the District in a case known as *National Student Association, Inc. v. Hershey*. The court said that it is immaterial what a directive is called and what it is in law; it is a rule as long as it is an au-

thoritive policy, something that the boards do obey. Therefore, any rule, as long as it is something that reflects on the registrant's duties or rights, is a rule or regulation for the purpose of mandatory prepublication. I thank you, Senator; I have nothing further.

Senator KENNEDY. Very good.

I understand you have made a life's work of this?

Mr. SILARD. In view of my age, I can't really call it a life's work as there was a long time when I was an engineer and a business manager. But, at the beginning of 1966, I retired and since then I have devoted all of my time and energy to these things. In my written statement I have identified myself as chairman of the Committee On Conscientious Objection And The Draft of the American Ethical Union. I might add that the latter is a federation of some 30 ethical societies in this country. Some of these call themselves ethical culture societies, and some others ethical humanist societies.

We have been very active, for well over a decade, on behalf of conscientious objectors who are in the category of less-traditional religionists, or are altogether nonreligious. We insisted on their equality with traditional religionists. Before my time of activity in the American Ethical Union, others there had written an amicus brief in the *Seeger* case; and many of the arguments in that brief were quoted with approval by the Supreme Court and used in part as the basis of its decision that validated nontraditional religious conscientious objection.

Since then, of course, the Supreme Court's landmark decision in *Welsh v. United States* has further broadened the conscientious objector standard so as to include, finally, the nonreligious, ethical and moral objectors also. Sometime thereafter, I helped write another amicus brief of the American Ethical Union—and, by the way, I am not a lawyer—in the Supreme Court. That was in the *Gillette* case which involved another religious objector. Our arguments for the supremacy of ethical conscience, in every respect as valid as that of religious conscience, remained undefeated, and in fact, unchallenged. The case was lost on other grounds, namely on the issue of selective objection to a particular war which the Court rejected. These involvements, and others discussed in my prepared statement, are at least part of the reason why I am so heated up about Dr. Tarr's self-made criteria for ethical objectors in his local board memorandum No. 107.

By the way, I must mention that the Director was very friendly to me last November 30 when I had a private meeting with him, subsequent to a group meeting which we had with him on November 17. In that private meeting which lasted 2 hours, I offered him all my research material, with court decisions and so on, which contradict his position. I was hoping that those will convince him. I am still waiting and hoping.

Now, as to the much-discussed form 150 for conscientious objectors, the Director did modify his first rough draft that had included all of those invalid criteria of local board memorandum No. 107. We now have a much better proposed and prepublished form 150. Unfortunately, it still includes one very important item that the ethical objector just cannot live with. Under penalty of the law for

not telling the truth it is impossible for him to describe his beliefs in a context in which only the traditional religionist presents his beliefs. The form tells him to do so but he cannot; it would be an absurdity.

I thank you very much, Mr. Chairman.

(The prepared statement of Mr. Bela Silard follows:)

PREPARED STATEMENT OF DR. BELA A. SILARD OF THE AMERICAN ETHICAL UNION
AND OF THE FELLOWSHIP OF ETHICAL PACIFISTS

Mr. Chairman and members of the Committee, my name is Bela Silard. I represent the American Ethical Union and one of its affiliates, the Fellowship of Ethical Pacifists. The American Ethical Union is the central agency of what is known as the Ethical Movement, an ethical-religious organization whose beginnings date back to 1876. The number of individual Ethical Societies which are federated in the American Ethical Union surpasses thirty by now. None of these individual societies nor their federation is, itself, a pacifist body. The Fellowship of Ethical Pacifists was founded 15 years ago by those of us in the larger movement who are pacifists, and all members of draft age are conscientious objectors.

For a number of years I have been, first the Secretary, and then the Chairman of the American Ethical Union's Committee On Conscientious Objection And The Draft, and on the Steering Committee of the Fellowship Of Ethical Pacifists.

For well over a decade, we have been deeply concerned with the legal status of the non-traditional religious as well as the non-religious conscientious objectors, whether or not they be members of our organization. We have been engaged in almost continuous efforts to have the law so changed, to see it so construed by the courts, and to have it so administered by Selective Service, that the discrimination against such objectors would come to an end.

Our official resolutions, submitted in *Exhibit A*, repeatedly called for recognition of non-traditional and non-religious beliefs as valid bases for exemption from military service. Our *amicus* brief in the famous *Seeger* case, *Exhibit B*, furnished the Supreme Court with a substantial part of the arguments for that favorable decision which has extended the coverage of the exemption to non-traditional religious objectors, even though the statute still had called for a belief in a Supreme Being.

In 1967, our representative, like those of other religious bodies, successfully urged Congress to remove the statutory reference to a Supreme Being. But for well over a year thereafter, Selective Service ignored the change. It continued, in the face of many sharp protests, the use of an old form for conscientious objector claims, and thereby an illegal administrative requirement of a belief in a Supreme Being. In the end, we did persuade General Hershey, and he accepted a proposal for a new Form which we prepared together with representatives of the Unitarian Universalist Association. This is the Form that has been in use ever since and is now up for revision.

But our aim was not yet fully achieved. We persisted in our demands for equality of conscientious objection based on purely ethical beliefs with that which grows out of traditional or non-traditional religious beliefs. Finally, in 1970, the Supreme Court's decision in *Welsh* further broadened its construction of the statutory standard. It now includes, and places on equal footing, religious, ethical, and moral objection. That landmark decision caused us to rejoice and to relax.

But in retrospect, we now realize that those years of struggle were actually the good old days. By 1970, there was a new Selective Service Director. He lost no time and spared no effort to emasculate the *Welsh* decision by administrative reinterpretation of the Court's holdings and thereby to turn that decision into a pyrrhic victory for our cause. He issued his own "criteria" and instructions to the draft boards on how to deal with non-religious, ethical and moral objectors. While paying lip-service to the equality of religious, ethical and moral objectors, he insists on the traditional religionists being more equal than others. He negates the Supreme Court's construction of the statutory language on "religious training and belief", and sets up the traditional-

ist's way of espousal of his beliefs as the very example which those who are less equal must follow. Thereby he seeks to exact from the moral-ethical objector a demonstration of such aspects of his beliefs which are utterly non-germane to his convictions and their development. The most glaring example is the Director's requirement for "training, comparable in rigor to the training of a traditional religious objector". But Local Board Memorandum No. 107, *Exhibit C*, in which these criteria are promulgated, contains yet further absurd requirements which, in their totality, round out Selective Service's entirely invalid image of the ethical objector.

The havoc these developments have wrought in the administrative determination of ethical objectors' just claims to exemption from military service demonstrated to us the urgent need for effective opposition to the Director's efforts. Extensive research into legislative history and intent as well as into pertinent judicial constructions produced a study just published in the Selective Service Law Reporter *Exhibit D*. The results consists in a set of arguments which set to naught the Director's asserted standards.

There was a time when the Director claimed championship of the will of Congress as against judicial constructions of the Supreme Court, as the basis for his reinterpreting the statute in his own way. At the 1970 House Armed Services Committee hearings he said:

The *Welsh* decision of the Supreme Court is quite contrary to what the will of Congress was.

But a year later, after he had suggested the inclusion of his own ideas into the statute, Congress rebuffed him. The 1971 Conference Report says:

The statutory language [on the CO qualification standards] has been subjected to intense legal scrutiny and interpretation by the Supreme Court. Therefore, no purpose would be served by rewriting this language to invite further unnecessary litigation.

The development of a currently proposed new Form for conscientious objectors also demonstrates that the Selective Service System is bogged down in the erroneous notion that even the totally non-religious objector must formulate his beliefs in a context alien to his thinking and germane only to that of the traditional religionist. It is yet another attempt to negate *Welsh*.

And this is still not all. Faced with the new statutory requirement that reasons must be given by the draft boards for any denial of a claim, the System has developed various lists of standardized, "canned" or "boilerplate" phrases that the boards are told to use. These lists of "reasons" are resplendent with the criteria culled from the Director's self-promulgated qualification standards of LBM 107. But the State Directors have done some further embroidering, so that their suggested phrases truly range from the silly, through the malicious, to the vicious. There can be but little doubt that any invalid CO classification criteria employed by the System will bring about that very flood of litigation that Congress clearly wanted to avoid.

Another of our deep concerns is the injustice administratively inflicted upon the CO who is to perform alternative civilian work. Involved here are official rules which cause the CO hardship for hardship's sake and disruption of his life purely for disruption's sake. These administratively decreed penalties go back to General Hershey's time. More than a year ago, I was able to document their illegality in a study published in the Columbia Survey of Human Rights Law, *Exhibit E*.

But in spite of widespread protest, the new Regulations continue, even though in less offensive language, most of those invalid rules. They do so in the face of contrary legislative intent to be found in the 1971 Conference Report. The conferees made it unmistakably clear that nothing but the national interest is to determine the assignment to work. True, the Report lists the hardships of the soldier's service and states that the CO may have to undergo hardships resembling somewhat those of a soldier. But nowhere did the conferees say that hardships may be inflicted on the CO for hardship's sake alone where the national interest does not require them.

Congress authorized the Director to define employment serving the national health, safety, and interest, but not to promulgate restrictions of a different nature.

Finally, the new regulatory delegation to the State Directors of the decision-making power in the area of work assignment is contrary to both the statute and the intent of Congress. The statute confers all power and duty

in this area to the Director and does not provide for delegation to lower echelons. The 1971 Conference Report spells out the rationale for this in that only the Director is conscious of the national needs, and states that the lower echelons may provide the Director with their experience. The errors in these Regulations are the more grave as they restrict even the rights of appeal to the National Director to the one initial step in the processing for work assignments.

In conclusion, we are placing these concerns and grievances before the Committee in the hope that it may yet successfully exert its influence on the Selective Service Director (as the Chairman and some of its members, in concert with other Senators, have already tried). The moral-ethical objector has had his happy day in court. And Congress has said that it is satisfied with that result. All that is needed now is to make the Selective Service System obey the law of the land.

(Exhibits are included in Appendix.)

Senator KENNEDY. Thank you. Mr. Tatum?

STATEMENT OF ARLO TATUM, CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS

Mr. TATUM. I would like, Mr. Chairman, to confine myself to just two points that have not been dealt with or rather, confine myself to those two points.

One relates to amnesty, which our two panels did not approach. I am one of the 1,200 or 1,500 who was pardoned by the President after World War II for having been a nonreligious objector.

One of the criteria they used was inadequate because I again refused to register in 1948 and went to prison so I can both represent those who have been pardoned and those who were not.

Senator KENNEDY. How long were you in prison?

Mr. TATUM. About 18 months the first time and just over a year the second time. My organization, the Central Committee for Conscientious Objectors, is undertaking, with the cooperation of the draft counseling network, a repatriation program in regard to draft violators in Canada. This is undertaken with the advance knowledge that a great many people who are in Canada violated illegal induction orders.

In other words, are able to return and don't know it. I had a friend a couple of days ago write to say that his indictment he discovered last week had been dismissed in 1970 and he had not been informed. We had another case where a State director had canceled the outstanding induction order, and this is in your State Mr. Chairman, and had asked the local board to inform the registrant that the induction order was canceled. They didn't do so and he didn't find out until 3 years later that he was able to return.

Senator KENNEDY. There is no procedure now to notify the person?

Mr. TATUM. Well, in that last case there was. The local board simply refused to follow the orders of the State director. There are other cases where there is no request made by the State director.

In some instances the information would need to come from the U.S. Attorney and in other cases from Selective Service. There are many other cases where the induction order is illegal but needs to be pointed out and we have had success in individual cases in getting Selective Service to cancel the induction order in getting a U.S. attorney to get the indictment dismissed or causing him to decline

to prosecute so that we hope that we don't have any curtailment of our efforts.

Sometimes we wonder if even perhaps a majority of the draft violators in Canada could come back if their files were examined. This is what we are undertaking to do for many thousands of people through the job counselors network, to examine their files.

We hope, in relating to amnesty, that this will change the view which prevailed even to some extent in your conversation with Dr. Tarr this morning, that this assumption that these men are law violators and criminals will change because in many cases the law was violated not by them but by Selective Service itself.

We hope that that will sort of change and the attitude towards some of the men in Canada will change.

The other subject which was discussed between Senator Hart and Dr. Tarr to which I would like to address myself is the one about which you asked me many questions in 1967 relating to selective objection.

In the Supreme Court case *Gillette*—although many people simply say that selective objection need not be recognized—in point of fact it indicated that hundreds, if not thousands, of men who call themselves selective objectors do qualify under the provisions and I feel that just as it is the responsibility of Selective Service to make the *Welsh* and *Seeger* decisions known throughout the System, it is also their responsibility to make the *Gillette* decision known throughout the System.

What the Supreme Court said in effect was that a person who honestly didn't know what he might do in some future hypothetical situation might very well qualify for conscientious objector status and his not knowing what he would do in this hypothetical future situation might be simply good sense. In other words, to qualify for conscientious objector status the question is in the present tense. You say, "I am a conscientious objector."

You do not swear that you always will be. This right to change your mind, this right to assess situations on the basis that they exist, this inability to thrust oneself into a hypothetical situation and swear that one would not participate in war, these are the characteristics that cause many young men to call themselves selective objectors and these men can qualify under Selective Service if it would only point this out.

Instead, as a matter of fact, they tend to go the other way. According to the Illinois State director, in giving the reason for refusing a conscientious objector's claim, which he sent to his local board, the director states that one evidence of uncertainty would be if the registrant repeatedly states that he is against the Vietnam war.

Now, I don't know if the Illinois director says if you say you are in favor of the Vietnam war this means that you are a sincere objector or not but we all know the one issue that is in the minds and hearts of our men is the Vietnam war and it is going to get the stress in any conscientious objector's claim and to suggest that the importance of the war in your claim means that you are not sincerely opposed to all war is seeking to place more people in an excluded category than the law indicates.

I would like to see any help this subcommittee can give us in getting Selective Service to make this known to their local draft boards extended. Thank you.

Senator KENNEDY. What can you tell us about the cases that you have reviewed in Canada? Have you done any kind of a survey of these cases or any kind of a review of these cases? Are there any general comments you would like to make?

Mr. TATUM. Not at this juncture. We are talking now only about a few chosen cases. There have been some cases where the men were anxious to return and were prepared to face prosecution to return and they discovered the judges were preparing to give probation subject to that man doing alternative service. So that you did have a amnesty basis although admittedly the person would have a felony conviction on his record and this is the kind of situation that is envisioned in some of the proposals in the Senate subcommittees.

But a good many men don't know whether they are indicted or not, for example, and at least would like to know that. They don't know whether their fight is with the local draft board or the U.S. Attorney. They don't know if a warrant is out for their arrest or not so that would fail to solve the basic problem of the man who authorizes us to examine his file. We will at least leave him better informed than he was before.

Senator KENNEDY. From your experience, do you think many of the young people will come back to the United States if this requirement of alternate service exists? What do you gather from your conversations with them?

Or, will they decline to come back until the end of the war and under a general amnesty?

Mr. TATUM. I would say a good many of them would not come back unless there is amnesty in the traditional meaning of the term, which means no strings.

I mean, as soon as you attach a penalty in my opinion there is no amnesty.

Senator KENNEDY. Do you recognize the distinction between those, as Senator Hart pointed out, that went to Canada and other countries because of the fact they truly objected to war versus the ones that got their hands caught in the till? At the end of World War II there was debate as to what kind of criteria to use that would be appropriate in this situation.

Mr. TATUM. I don't know. Again, I would say that this very characteristic after World War II is why there was not amnesty. Amnesty is not granted on the merits of the position or it is not saying you were right in what you did. Amnesty is nonjudgmental and that is what amnesty must be in my opinion. I think very often I have very mixed motivations about some of the things I do and I don't think you can clearly differentiate to what degree conscience is involved.

I think this is very difficult to ascertain but in my opinion, if the induction order was invalid when he went to Canada, then I would say why he went, the philosophy or the philosophical reasons are even less relevant.

I admit I would personally get a greater pleasure out of helping a conscientious person.

Senator KENNEDY. If he had taken a car out of the motor pool, for instance, do you think he ought to be included in the general amnesty?

Mr. TATUM. If he has committed an offense, there would be another charge against him to which a general amnesty wouldn't apply.

Senator KENNEDY. Is it your position for the general amnesty now or at the end of the war?

Mr. TATUM. My organization doesn't have a position. I just think that it might be politically impossible now but I would like to see it now. I think the ground swell in favor of amnesty is good and I view all of this as groundwork for an amnesty when it becomes feasible and I suppose that is one of the few things in which I believe with Dr. Tarr that will probably when induction authority ceases and of course I feel the sooner the better for that as well.

Mr. SILARD. Mr. Chairman, may I add that a large number of these young men abroad have not committed any crime, where it is not a question that they have neither refused induction nor taken a car out of the motorpool. They are people who emigrated from this country before they were obligated to do anything in Selective Service. They emigrated as young men who said we do not want to wait until we either have to break the law or become soldiers. This is a very large number of people. They went abroad, and most of them are in Canada, they are Canadian immigrants with the idea to become Canadian citizens; and others are in limbo, but they have not broken any law.

Now, if somebody has not broken any law, he cannot come under amnesty. My organization studied the question very carefully and finds that this large group of people needs an entirely different treatment. The problem for these people who want to come home, and I assume that 90 percent would want to come home, the problem of these people is very much simpler. It is the helpful administrative handling of their re-immigration into this country and regaining of U.S. citizenship which some have renounced. I think this is generally overlooked.

Since you will have 2 more days of hearings, maybe you can elicit more from people who know about the legal aspects of re-immigration and so on, to explore this further if you wish.

Senator KENNEDY. If we were to have a general amnesty now, would you tell me your position on this?

Mr. BRUNK. Our organization does not have a position in this. I personally agree very much with Mr. Tatum's position.

Senator KENNEDY. You see, we are going to eventually have to come out and say we will have a general amnesty at the end of the hostilities or we will have a general amnesty now. Now, the President has attached a penalty to it but still, he states the amnesty would be at the end of the war with the return of the prisoners of war.

Do you think we should have a general amnesty at that time, less the penalty that the President talked about, but in the meantime have a conditional amnesty for people who want to come back now if they do public service?

I am just thinking how we can do this, that is, from a public policy point of view in that there is only so much we can do as a committee. So, I am interested in the opinions of the people who are interested in this and who feel deeply about it.

Mr. TATUM. I think from my point of view there is a fairly substantial difference between tying it into the end of induction authority as opposed to tying it to the end of the war. I think Congress—

Senator KENNEDY. So you would tie it to the end of induction?

Mr. TATUM. Yes, sir. It is much more specific then.

Mr. SILARD. The induction authority does not actually end on June 30, 1973, because as you know, section 17-C of the act provides that anyone who has been deferred can still be inducted at any time after June 30, 1973. So this remains quite possible, unless Congress repeals section 17-C.

In theory the Government can go on drafting everybody who will be in the pipeline in mid-1973, until he turns 26 years old.

Mr. BRUNK. Of course, they wouldn't have to wait until the induction authority expires. The Selective Service System is not now inducting persons and won't have to induct persons from now on until the induction authority expires. If that happened, the time would be right for a general amnesty.

Senator KENNEDY. I want to thank you very much for being present with us today.

I think we have some valuable testimony and I want to thank all of you. The subcommittee will be in recess until tomorrow.

(Mr. Tatum's prepared statement follows:)

C.C.C.O.
AN AGENCY FOR MILITARY AND DRAFT COUNSELING,
Philadelphia, Pa., February 24, 1972.

STATEMENT TO THE SENATE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE

I am Arlo Tatum, National Secretary of the Central Committee for Conscientious Objectors. CCCO, an Agency for Military and Draft Counseling, was founded in 1948. As its head, I have devoted the last ten years of my life to draft-age men and their problems and had the pleasure of being called to testify before this Sub-Committee in 1967. I am editor of the Handbook for Conscientious Objectors, co-author of Guide to the Draft, and a contributor to several books and periodicals on this subject.

I, like most draft counselors, opposed continuation of the draft last year, when Congress extended it to June 30, 1973. We feel that the practicality of its termination has since been confirmed by both the few men drafted since and the thousands being released from active duty up to eighteen months early.

Despite this position, we are pleased with the substantial reforms incorporated into the law on the initiative of the Senate. Most of them simply obliged the Selective Service System to extend procedural rights long offered by other administrative agencies of the Federal government but not by Selective Service.

I was especially encouraged by 1) the requirement that regulations be published in the Federal Register for 30 days before they could go into effect; 2) the requirement that local boards and appeal boards must provide reasons for turning down requests for classifications; 3) the right to witnesses at personal appearances before local boards; 4) the right to appear before the appeal board; 5) the shifting of responsibility for alternate service for conscientious objectors from often prejudiced and confused local boards to the Director of Selective Service.

I am perplexed and distressed that instead of welcoming the first four of these reforms and seeking to give them maximum effect in the new regulations, Dr. Tarr has instead promulgated regulations which reduce their impact to the bare minimum and in my view are contrary to the will of Congress. Dr. Tarr has thumbed his administrative nose at Congress in general and at the Senate Sub-Committee on Administrative Practice and Procedure in particular, since the Chairman of this Sub-Committee initiated most of the reforms.

Our hopes in regard to the fifth point—that the Director would institute a more liberal and enlightened policy in regard to alternate service for conscientious objectors—have also been dashed. The Director saw fit to transfer his new powers to the State Directors, and promulgated regulations which suggest a thoroughgoing contempt for both recognized conscientious objectors and due process of law.

I am not without sympathy for Dr. Tarr, who is in a unique position. He directs a Federal agency in which part-time untrained volunteers are charged with making what are sometimes literally life-or-death decisions about the young men obliged to obey those decisions, face prosecution, or flee the country. Suddenly these part-time volunteers, who have for the most part relied on their full-time paid civil servants actually to make decisions, are taken seriously by Congress and are obliged to state reasons for their classification actions and to talk with witnesses who may well be leaders of their local communities. Appeal boards must not only actually meet with the young men they have been classifying—for the most part without reading their files—but a majority must be present and have some idea of what they are about.

These Congressional reforms, therefore, placed Dr. Tarr's untrained, part-time volunteers in an awkward position, and Dr. Tarr responded defensively. He reduced the period during which one can request a personal appearance or make an appeal by half, from 30 days to 15. It is well-known that a youth in this day and age does not sit quietly at his address of record awaiting some word from his draft board. He moves about. And our Postal Service is erratic. Perhaps Dr. Tarr will prepare a special Selective Service form for registrants abroad, reading: This is to inform you that, had you received an enclosed classification, within 15 days, you would have had the right to appeal. At any rate, the traditional extended time limits for registrants abroad have been eliminated.

The effect, obviously, will be to cause thousands of registrants to miss the deadline, and thereby their right of personal appearance and appeal. I'm sure the part-time volunteers are grateful to Dr. Tarr.

To establish, as the new regulations do, a mere fifteen minutes as the normal length for a personal appearance, drastically reduces the value of a registrant's new right to present up to three witnesses. That gives each witness and the registrant himself 3 minutes, forty-five seconds apiece, assuming the local board members have no questions or comments. But would it not be sensible to explain their stated reason to the registrant? Yes, but then there would be even less time for the witnesses and the registrant to persuade the board it had made a mistake. I wonder if the administrative hearings of the Department of Internal Revenue are normally fifteen minutes in length when only money is involved.

I have expressed to Dr. Tarr directly my objections to his circumventing the Congressional requirement to pre-publish regulations by setting out elsewhere procedures one would expect to find in regulations. One example is the Registrant Processing Manual.

The alternate service regulations are astonishing. For example, they empower a state director to approve an assignment for alternate service and have the CO begin his work—then change his mind, without saying why, and order the CO to another job, without advance notice to either the CO or his employer. Not only need he give no reason for his action, but the new assignment may be anywhere and may be totally unacceptable to the CO. There is no administrative review of the decision and no right of appeal.

Does Dr. Tarr see his responsibility over recognized COs as analogous to that of a prison warden over his prisoners?

If my tone is angry, it is because Dr. Tarr started off well his assignment as Director of Selective Service. He persuaded me that he desired to bring greater fairness into the System and intended to do so. He set out to inform

registrants of their rights, which the System had never done before. As I said, he made a good start.

Whether I was misled, or whether unknown pressures have led to a reversal of his initial good intentions, I do not know. But the new regulations show a lack of respect both for the will of Congress and for conventional concepts of fairness.

Respectfully submitted,

ARLO TATUM.

(Whereupon, at 5 p.m., the subcommittee recessed to reconvene at 10 a.m., Tuesday, February 29, 1972.)

SELECTIVE SERVICE PROCEDURES AND ADMINISTRATIVE POSSIBILITIES FOR AMNESTY

TUESDAY, FEBRUARY 29, 1972

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 4232, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding), Hart, and Thurmond.

Also present: James Flug, chief counsel; Thomas Susman, assistant counsel; and Mark Schneider.

Senator KENNEDY. The subcommittee will come to order.

The Senate Subcommittee on Administrative Practice and Procedure will explore today one of the many tragic byproducts of our Vietnam war policies.

For not only have 55,000 American men been killed, not only have 300,000 been wounded, and another 400 imprisoned in North Vietnam, but we also have caused perhaps the greatest internal division in our own Nation in a century.

The Nation has been wrenched apart by the war and the emotions unleashed in its wake. All of us and all of our institutions have felt the impact of those emotions.

When we view the results of this war, we find no beneficiaries, we find only victims.

Our first task must be to end the war, to stop the suffering, to cease creating new victims of our policies.

But our second task must be to ease the pain of the victims. For those who have given their lives, we can only mourn and give aid and comfort to their families. For those who are wounded, whether through loss of limbs or addiction to drugs, we must be overwhelmingly generous in our dispensation of help and assistance. And for those veterans who return without physical marks but with the emotional torment that any wartime experience must cause, for them as well we must find new ways to ease their reintegration into society. And for the Vietnamese, when the time comes, we must seek to help in the rebuilding of a land that we have helped to ravage. But as those things are done, there still remains one class of victims that we must consider. They are the convicted offenders, the exiles, the deserters, the men facing fugitive warrants for draft evasions, the men against whom indictments are pending and the men who have never registered.

Today we shall explore what the Nation's policy should be toward them.

And as we address this question, we must recognize that it is as emotional a question as the busing issue that the Senate will decide this afternoon.

On every college campus, the question of amnesty is one of the first a political leader must answer.

And in thousands of homes of World War II veterans, the issue of amnesty produces angry reactions.

What we hope is that we can begin to provide a rational understanding of the many questions that must be answered by the Nation in resolving the issue of amnesty.

Is today the right time for amnesty to occur, or is it when the last soldier leaves Vietnam, or should it be on the same date that the draft expires?

Do we provide the same conditions or lack of conditions to deserters as we do for draft evaders?

How do we distinguish between those who based their actions on strong moral convictions and those among the deserters who have fled for other reasons?

These are difficult, complex and emotional issues.

We shall look first to history to give us an understanding of what our own traditions have been. For 29 times since independence, we have offered amnesty. Less than a dozen years after the new Nation's Constitution was ratified, President Washington offered the first amnesty to those men who had participated in the 1794 Whiskey Insurrection.

Between that date and the Civil War, a half-century later, seven more amnesties were proclaimed by American Presidents. And it is important to recall that in at least one of those cases in 1830, President Jackson offered unconditional amnesty to deserters.

But it was the Civil War experience that I believe presents the most compelling parallel to the situation today. Then, the division within the Nation went to the point of rebellion. The Southern States left the Nation and while the Supreme Court ruled that it was an act of rebellion, the Congress passed laws calling it treason. And in the aftermath of that war, many were indicted for that offense.

But throughout the war, President Lincoln and then President Andrew Johnson understood that the future of the Nation would not be built on a permanent rupture between the people of this land. It was not merely a question of victor and vanquished, but rather of men on both sides who had followed their beliefs in what was right.

And so, President Andrew Johnson, on Christmas Day 1868, proclaimed "Unconditionally and without reservation, to all and to every person, who directly or indirectly, participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States. . . ."

Clearly, it was recognized then, despite the furor which followed that act, that the Nation must bind up its wounds and seek to move forward in union, that those who had placed conscience so far above country that they had withdrawn from the country, should be welcomed back into the country.

Then, it was an expression of strength, of the willingness of the Government to declare its strength by its grace and to declare its compassion by its willingness to forget the penalty that the law would otherwise demand.

And today we have many of the same concerns. For we too have had young men follow their consciences to prison and to exile. We too have seen a nation divided against itself and we too must look to the future.

But besides our tradition, there are other compelling reasons as well for an inquiry into the possibility of amnesty.

These young men believed the war was wrong. They were willing to go to prison or to cut themselves off forever if necessary from family and friends. Those were not easy decisions. They were the moral decisions of principled young men whose commitment and consciences might offer a great deal to the Nation in the future. Our national reservoir of moral initiative and determination is not so ample that we can afford to shut them out.

And for those of us who have condemned the war as an outrage, it is difficult to conceive of denying amnesty to those young men who saw the things we now see, but saw them sooner and who did the only thing they could. Faced with the dilemma of violating the selective service law or violating what to them were moral imperatives against participating in a war they saw as evil, they chose prison or exile.

What we must ask is whether the Nation wants to offer reconciliation to a generation of young Americans, to their families and to their communities, whether we are strong enough to be compassionate and understanding, whether we have enough faith in our market place of ideas to welcome minds that have disagreed with us, whether our own commitment to a generation of peace is firm enough to include peace with our own children.

These are the questions we will discuss today.

And, as we do, we might well ponder the Easter sermon of the late Cardinal Cushing:

Would it be too much to suggest that we empty out our jails of all the protesters—the guilty and the innocent—without judging them; call back from over the border and around the world the young men who are called deserters, drop the cases that are still awaiting judgment on our college youth? Could we not do all of this in the name of life, and with life, hope . . . Wherever our young people, even for reasons we do not know, stand in need of mercy let us reach out to them.

Our first witness this morning is Mr. Henry Steele Commager of Amherst College, perhaps the most distinguished historian of our country today. He has charted a course of scholarship and wisdom in his books and lectures for half a century. So it gives us a great deal of pleasure to introduce him today.

Senator THURMOND. Mr. Chairman, could I make a statement, too?

Senator KENNEDY. I recognize the Senator.

Senator THURMOND. Mr. Chairman, the involvement of the United States in Indochina has brought and is continuing to bring mixed reactions from all sections of our society. To say that this war has been an unpopular one is indeed an understatement.

Our involvement amounted to a peak commitment of over one-half million men at one time. In fact, when President Nixon assumed office there were over 550,000 men in South Vietnam. The President has courageously reduced our manpower involvement to an expected 69,000 as of May 1 while at the same time has maintained the integrity of this country and of South Vietnam. He has revealed a peace proposal which would totally end our military participation while at the same time bring home prisoners of war being held by the North Vietnamese.

This country made the decision to preserve the freedom of South Vietnam, a country which, except for our assistance, would have long since been crumbled by Communist aggression. Future historians will debate the wisdom of our involvement in Indochina and the wisdom of our strategy once we became engaged. The fact is we did become involved just as surely as we became involved in World War I, World War II, and in the Korean Conflict. As of September 30, 1970, over 2.5 million men had served in Vietnam. This figure does not include the millions who have served in a supporting role here and abroad.

Throughout the history of our Nation we have drafted men into the Armed Forces. Likewise, throughout our history there have been those who have evaded serving their country one way or the other. We should be proud that the vast majority of Americans who have been called to serve in the military have served honorably and with exceptional distinction.

Regretfully, however, as with regulations and requirements in other areas of our society, there have been and will be those who fail to serve when they are drafted, and there are those who have deserted after they have entered the military.

Lawlessness and disregard for the law is one of the serious ills of our society. Strict enforcement of the law and just punishment of offenders is absolutely necessary and is demanded under our constitutional system. We should apply the same system of justice to those who break the law requiring military service as we apply it to those who break any other law.

In my opinion, which I feel is shared by many others, there is no greater service a man can render his country than to serve in the Armed Forces. Equally important is the service we all can render by showing respect for the law. This service demands that those who disobey the law be appropriately punished.

The law provides that draft evaders and those who desert from the Armed Forces be appropriately punished. Retrospective politics of our involvement in Vietnam should not alter this.

Many men who served in Vietnam differed with our Government's decision to send them there. Many of them were wounded, some are maimed for life. Many were killed. Some are being held as captives by the North Vietnamese. In the face of these sacrifices how can we possibly consider an amnesty for those who took the unlawful way out by evading the draft or by deserting? The possibility of administrative amnesty should not even be considered until we have brought home all our men from combat zones and from prisoner-of-war camps. Then the primary problem will be to mete out justice

to those who violated draft and desertion laws. In my judgment there will be very few who, through unusual extenuating circumstances, might qualify for amnesty.

As I stated yesterday, those who were conscientious objectors did not have to go to Canada, Sweden, or some other country. We have provisions in our law to arrange for special consideration for this type of person. So those who went either went erroneously when it was not necessary if they were conscientious objectors or they are not willing to fight for their country. In my judgment, a man must be willing to fight for his country in time of war. I have little patience for those who are not willing to do so. It is very unfair for those who are forced to go and allow others who are not willing to serve to be excused and then grant an amnesty.

Yesterday, the distinguished chairman, it seems, related the War Between the States to this situation and insinuated, if not called, those who fought on the Southern side traitors. If I am incorrect, he can correct the record. He later said that some called them traitors, but I believe the record itself, in his first statement, referred to them as traitors.

Now, again, I want to say today that no section of this country is more patriotic than the South. In World War I, my State had, I believe, more Congressional Medal of Honor men than any other State in proportion to its size. The South has always fought for America. The South did have its differences back when the South seceded from the Union on December 20, 1860, I believe that the first ordinance of secession was approved and then the rest of the South withdrew.

As I stated yesterday, they were following what they considered constitutional rights, the right of a State, the right of the State to join the Union, which it did. It did not have to join the Union. And they felt when they joined voluntarily, they had a right to secede voluntarily, and that is exactly what they did.

But I want to say this, that they did not just secede and run off to some other country: they seceded and fought for what they believed in. That is far different from today.

These men who run to Canada and Sweden and other places have fought for neither side. They have just evaded military service. There was an honest difference in men who were willing to fight for and did fight for it back during the War Between the States. I cannot imagine anybody today calling those people traitors. It is an outrage. And I think anyone who called those people traitors are cowards themselves and I do not care who it applies to. I am convinced that those people were just as patriotic and loved their countries just as much and loved America just as much. And no people of this country underwent the sacrifices they did after that war. They were under military rule for 10 years. They suffered enduring hardships. Yet they supported this country and supported its government and provided fighting men in every war this country has fought. And today, the South, I think, is the heart of patriotism. I do not know what this country would do today if it were not for the South.

The South is doing more today, I think, to hold this country to-

gether than any other section of this country. I think they are the most loyal people; they believe in the constitution to a great extent and they stand for the principles that made this country great. And when anyone refers to those who fought on the Southern side as traitors, I think they are indeed exaggerating the situation and they are making false statements and they simply do not know history.

I want to make this statement to clear up what was said yesterday and the record will speak for itself. The reporter took the record and that will speak for itself and others who heard the record—that will speak for itself.

But I want to be perfectly clear on this point that there is no relation to the war between the South and the North that began in 1861, or maybe actually in 1860, and the present situation. Today, these men who ran off to Canada and Sweden and other places were not willing to fight for their country. And I repeat, if they were conscientious objectors, they had a remedy here at home. Why did they go? I think the public can answer that question.

Senator KENNEDY. In the meantime, we will hear from Mr. Henry Steele Commager. Perhaps he can add insight into the history of this situation.

STATEMENT OF HENRY STEELE COMMAGER, PROFESSOR OF HISTORY, AMHERST UNIVERSITY

Mr. COMMAGER. Gentlemen, traditionally, it is the Executive that has taken the initiative in granting amnesty, but recent Executives have displayed less interest in amnesty than was customary in the 19th century: thus there was no amnesty after the Korean war and has been none so far in this war. It is therefore reassuring to see the Congress take the initiative in this matter so fraught with importance to the harmony of society and to the sense of justice. The American people should be grateful to Senator Taft for raising this issue in practical form, and for proposing a solution, even if partial and in some respects inadequate. We should note at once that Senator Taft's proposal does not embrace military deserters. As I think desertion and draft evasion are inextricably part of the same pattern and the same problem, what I have to say this morning will apply to both categories of offenders.

We do not have, and, in the circumstances we cannot have, accurate statistics of desertion and draft evasion for the past 7 years. It seems probable that desertion has been higher in the war in Southeast Asia than in any war in which we have ever been involved with the possible exception of the Civil War, desertion in the North was 11%; in the South 10%; the comparison is faulty. However, in the North it was possible to buy substitutes. Without that, it would have been greater. In 1970 the desertion rate in Vietnam was 52 per thousand—twice the rate, by the way, of the Korean war; up to September 1971 it was 73.5 per thousand: many of these deserters were subsequently returned to military control. As for draft evaders estimates run from fifty to one hundred thousand, but as many potential draftees took cover before being formally inducted, these figures are almost meaningless. This high incidence of desertion and

draft evasion is not, I submit, a commentary on the American character, but a commentary on the war; after all there was neither large-scale desertion nor draft evasion in World War II, and the national character does not change in a single generation. What is by now inescapably clear is that the Vietnam war is regarded by substantial elements of our population—particularly the young—as unnecessary in inception, immoral in conduct, and futile in objective; what is clear, too, is that more than any war since that of 1861–65 it has caused deep division and bitter dissension in our society. The task which confronts us then is not dissimilar to that which confronted Presidents Lincoln and Johnson, not merely that of ending the conflict in Asia. It is that of ending the conflict at home, of healing the wounds of war in our own society, and of restoring—it is a Thomas Jefferson phrase—"restoring to social intercourse that harmony and affection without which liberty and even life itself are but dreary things."

The term, and the concept, of amnesty is very old. The word itself is Greek—*amnestia*—means forgetfulness, oblivion, the erasing from memory.¹

I cite this not out of pedantry but because it illuminates the problem that the distinguished Senator from Ohio has raised: whether there can in fact be conditional amnesty? Can there be partial oblivion, can there be a qualified erasing from the memory? Can it be supposed that draft evaders who take advantage of the amnesty proposed by Senator Taft—that of working out and presumably expiating their sins for a period up to 3 years—will during these years of forced service forget or erase from their memory this whole unhappy chapter of their history and ours? Can it be supposed that after the guns have fallen silent and the bombs have ceased to rain down on the stricken lands of Vietnam and Laos, deserters who are tried and punished for their military offense, will be able to put the war out of their minds? And indeed can it be supposed that while these unfortunates are doing penance in various ways, the Nation will be able to forget, or to consign to oblivion, the deep moral differences which animated those who fled their country or their regiments rather than violate their consciences? If it is forgetfulness and oblivion we want, or even reconciliation and harmony, we shall not achieve it by this labyrinthine route.

The question of amnesty and/or pardon to draft evaders and deserters is not really a legal or constitutional question. There is no doubt about the constitutional right of the President to grant pardon and to proclaim amnesty, and none about Congressional right to enact amnesty, nor is there any constitutional obligation in either President or Congress to take any action at all. The argument for amnesty is threefold: historical, practical, and ethical. It is to the interesting question of experience, the illuminating question of expedience, and the elevated question of moral obligation that we should address ourselves.

We may dispose of the history summarily, though one chapter of

¹ There is the highest judicial sanction for this definition: "Amnesty is the abolition and forgetfulness of the offense; pardon is forgiveness," said the Supreme Court, *Knote v. U.S.*, 95 U.S. 149.

it, despite what the distinguished Senator from South Carolina has said, is both relevant and illuminating.

The American Revolution—the first occasion for this problem—was a civil war. Those who supported the Crown—John Adams estimated them at one-third the total population—were exposed to the obloquy and persecution that attends most civil wars. They suffered deprivation of position, confiscation of property, physical violence, and exile. During and after the War some 80,000 Loyalists fled the country, mostly to Canada. A few returned, but public opinion, and legislation, was so implacably hostile to loyalists that the vast majority preferred exile. Thus for want of magnanimity, and of wisdom the new Nation—a nation which needed all the resources which it could obtain—lost a substantial and valuable segment of its population, established in Canada a body of United Empire Loyalists, whose unifying principle was hostility to the United States, and earned an international reputation for harshness and rancour. Desertion was, as we all know, endemic in Washington's Army—it all but drained away the army at Valley Forge—but after the war was over no effort was made to punish war-time deserters. As President, Washington established the precedent of generosity for those guilty—or allegedly guilty—of insurrection: as Senator Kennedy has reminded us, he proclaimed amnesty for participants of the Whiskey Rebellion, observing, in words that are relevant today: "Though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet my personal feeling is to mingle in the operation of the Government every degree of moderation and tenderness which justice, dignity and safety may permit." (I Richardson, 266).

John Adams took the same attitude toward the so-called Fries Rebellion of 1799, granting "a full, free and absolute pardon to all and every person concerned in said insurrection." Jefferson in 1807 pardoned all deserters from the Army of the United States who returned to their units within 4 months; Madison issued no less than three proclamations of the same nature, covering deserters in the War of 1812. President Jackson's Amnesty of 12 June 1830 had an interesting twist to it; he pardoned all deserters from the Army provided they would never again serve in the Armed Forces of the United States.

It is the Civil War which provides us with the best analogies and, I think, the best models for our own time. Desertion from both Union and Confederate armies ran to roughly 10 percent—rather above than below that figure. Draft evasion was widespread and flagrant, complicated in the North by what was called bounty-jumping, that is multiple enlistments and desertions to collect bounties. While neither draft dodgers nor deserters constituted a danger in the North, they did in the South; it was said—on what authority is not clear—that there were more deserters and draft evaders in the mountains of the Carolinas, in 1864, than there were soldiers in Lee's army. Appomattox put a period to the problem in the South: no action was taken against either deserters or draft evaders after the end of the war in the North.

What is illuminating, however, is the attitude of Presidents Lin-

coln and Johnson towards Southerners who had engaged in rebellion and were, technically, guilty of treason. The technical guilt there cannot be doubted, whatever the moral guilt. The Constitution, as you gentlemen know, defines treason—it is the only crime that is defined in the Constitution—as bearing arms against the United States.

Should "rebels" be brought to justice, and punished? Should States that had joined the Confederacy be punished? Lincoln's position was clear and consistent. During the war, he issued a series of amnesty proclamations designed to bring Confederates back into allegiance and to get government in operation in the South. He had been unwilling to "let the erring sisters go in peace"—as Horace Greeley recommended—but he was ready to let them return in peace. Congressional radicals wanted to punish the South for its treason by excluding Southern States from full membership in the Union: in the end, as we know, they succeeded at least in part in their vindictive policy. Lincoln would have none of this; indeed he regarded the question of the legal status of the Confederate States as "a pernicious abstraction." "Finding themselves safely at home," he said—an observation that might be said of our draft evaders who after all did not bear arms against the United States—"it would be utterly immaterial whether they had ever been abroad." And how fascinating Gideon Welles's recollection of that last Cabinet meeting which Lincoln attended which discussed the question of capturing Confederate leaders and bringing them to trial. "I hope there will be no persecutions," said Lincoln, "no bloody work after the war is over. No one need expect me to take any part in hanging or killing those men, even the worst of them. . . . Frighten them out of the country, open the gates, let down the bars, scare them off" and—as Welles tells us, opening his hands as if scaring sheep off—"enough lives have been sacrificed." Enough lives have been sacrificed!

Who can doubt, now, that Lincoln's policy of magnanimity was wiser and more far-sighted than the radical policy of punishment? Even the radicals were not vindictive by modern standards. How gratifying it is after all for the United States to recall that the United States put down the greatest rebellion of the 19th century, without imposing on the guilty any formal punishment. Not one leader of the defeated rebels was executed, not one was brought to trial for treason. There were no mass arrests, no punishment even of those officers of the U.S. Army and Navy who had taken service in the Confederacy. No soldier who wore the gray was required to expiate his treason, or his mistake, by doing special service, none was deprived of his property—except property in slaves—or forced into exile by governmental policy. What other great nation, challenged by rebellion, can show so proud a record? Not England in the 17th century, not France in the 18th, not Spain or Russia or China or Cuba or any other in the 20th.

We can dispose with lamentable brevity of the record in the present century, for it is a brief record. There was no general amnesty for draft evaders or deserters after World War I. Indeed those guilty of violating the espionage and sedition acts—among them Eugene Debs—languished in jail while President Wilson was in the White

House. That dangerous radical, Warren G. Harding, gave him a pardon, and his equally radical successor, Calvin Coolidge, released most of those who were still in jail when he came to the Presidency. No major war in which we have engaged saw fewer desertions or draft evasions than World War II—a war which almost all Americans thought necessary and just. Yet when Vice President Truman came to the Presidency, in 1945, there were some 15,000 draft evaders and other offenders against the military law in Federal custody. Truman appointed a committee, headed by Justice Owen Roberts, to advise him on what action he should take. The committee advised against a general amnesty and recommended individual consideration of each case. This advice was accepted; only one-tenth of those in jail were actually released, however—not a very gratifying result.

One final observation and we are finished with our historical recapitulation. It is not without interest that confronted with acts of hostility against the Nation incomparably more serious than those alleged against our deserters or draft evaders, France, Norway, Belgium, the Netherlands, and Japan all granted partial amnesty to those very large segments of their populations who had engaged in disloyal activities. It is perhaps even more relevant to recall that that great soldier who was also a great statesman and patriot, General de Gaulle, proclaimed a general amnesty to the overwhelming majority of those who had resisted—even by arms—his policy during the Algerian crisis.

In all this we are reminded of what that other great soldier and statesman, Winston Churchill, said, "There must be a blessed act of oblivion."

More important than historical precedents, however illuminating, are considerations of wisdom and of morality. Here we come, I think, to the heart of the matter. A nation does not adopt important policies—policies affecting the lives of hundreds of thousands of its young people, and affecting the whole fabric of the social and the moral order—out of petulance, or vindictiveness or vengeance. It bases its judgment rather on the interests of the Commonwealth. Nor do statesmen indulge in what Lincoln called pernicious abstractions—abstractions about whether magnanimity to some will somehow be unfair to others: after all who knows what is ultimately just, or what will ultimately satisfy the complex passions of a vast and heterogeneous society? We should make our decisions on the question—complex enough to be sure—of what appears to be to the long-range interests of the Nation.

When we consider the problem of amnesty in this light, there are a number of considerations which clamor for our attention: (1) There is the consideration that those who deserted either the draft or the Army, were not young men indulging themselves in reckless irresponsibility, or confessing cowardice. They were, and are—we must concede this is the face of a resistance so massive—it is conceded, too, by the Supreme Court of the United States—they were acting quite sincerely on conscience and principle. After all this is the position that wise and objective judges of the Supreme Court accepted in both the notable conscientious objectors cases—*Seeger v. United States* and *Welsh v. United States*. We must put aside for

the time being the question whether the deserter-evaders are right in their convictions, or whether those who oppose them are more nearly right. What we cannot deny is that the vast majority of them acted on principles that they felt—what I think the majority of the American people now feel—that the war in which they were required to participate was misguided and immoral; they rejected it therefore on moral grounds. This is a position the American people have always respected—not only in questions of military service, but in other large issues of public policy: the obligation to return fugitive slaves to their masters, for example which was widely disregarded throughout the North.

It is a principle, too, we have respected in others. It is not the “redcoats” who laid waste the countryside in the American Revolution whom we remember and admire because they obeyed the law, but those back in Britain who thought the war on the Colonies a wicked war and refused to have any part in it—Jeffery Lord Amherst, after whom my college is named, the highest ranking officer in the British Army, who refused to resume active service against the Americans; Lord Admiral Keppel, the highest ranking officer in the British Navy, who refused to serve against the Americans, Lord Frederick Cavendish who sat the war out; the Earl of Effingham, who turned in his commission rather than fight in America—and was thanked for this by the corporations of London and Dublin.

(2) Nor can we overlook another consideration, that in many ways the deserters and draft avoiders of today are like the “premature antifascists” of the 1930’s, who suffered persecution during the Joseph McCarthy era because they had fought fascism abroad before the country caught up with them. May we not say that the majority of those who have deserted or gone underground merely took “prematurely” the position which the majority of Americans now take; more, that they took prematurely the position which the Government itself now takes—that the war was and is a mistake, that we should extricate ourselves from it as expeditiously as possible, and that the whole enterprise of fighting a war designed primarily to contain China looks faintly absurd at a time when our President has gone to China to arrange and prosper closer relations with her? May not the deserters and evaders claim that their error is to have been ahead of public opinion and of Government policy, and that it should be easy to forgive this error? (3) There is a third consideration which affects a substantial number of those it is now designed to deal with by amnesty—a group who may be designated premature moral objectors. For as all of you know, the legal interpretation of what constitutes acceptable objection on grounds of conscience has changed radically. That change began as early as 1965, in the notable case of the *United States v. Seeger* (380 U.S. 163), which extended exemption from the draft to those who embraced a “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.” Speaking through Mr. Justice Clark, the Court held that Seeger was entitled to exemption “because he decried the tremendous spiritual price man must pay for his willingness to destroy human life.” But in 1965 the Court still required, as a legal basis for exemption, some belief,

however vague or remote, in a Supreme Being. But by 1970 the Court was prepared to accept moral and ethical scruples against the war as meeting the requirements which the Congress had set for exemption on account of conscience. That requirement, wrote Justice Black—from your section of the country, Senator Thurmond—that requirement “exempts from military service all those whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.” 398 U.S. 333, at 344.

Clearly if those whose opposition to war is based not on formal religious beliefs but on moral and ethical principles, are now exempted from service, then those with the same beliefs who were denied conscientious objector exemption in the past have an almost irresistible claim on us for pardon or amnesty.

There are to be sure some serious objections to be met—not the objections inspired by passion, by prejudice, by vindictiveness; these must be left to that religion which so many feel the deserters and evaders have flouted, or to the healing force of time—but objections based on considerations of public policy. It is alleged, for example, that a sweeping amnesty would somehow lower the morale of our fighting forces. Quite aside from the observation that it is difficult to see how that morale could be any lower than it now appears to be—it is proper to say that there seems to be no objective evidence whatever to support this argument. It does not appear that amnesty worked this way in the past, in the relatively few instances where it was applied while the war was still going on. Nor is it irrelevant to note, for what it is worth, that there is strong support for amnesty from a number of veterans’ organizations today.

But would a sweeping amnesty make it more difficult for the United States to recruit or draft an army for another war as Mr. Tarr observed yesterday. Such speculations are what Lincoln called pernicious abstractions: certainly Lincoln’s use of amnesty did not appear to have any effect whatever in later wars. The notion that 30 years later, people remember these things and act on them seems to me a figment of imagination.

There is a further point here. Is there not something to be said for putting Government on notice, as it were, that if it plunges the Nation into another war like the Vietnam—it will once again be in for trouble? After all governments, like individuals, must learn by their mistakes, and though the process of teaching Government not to make mistakes is a very arduous one, often hard on those who undertake it, it is also often very useful. Southern States no longer threaten to secede; Congress no longer threatens to establish military government in States that do not behave themselves; whatever we may think about the dangers of alcoholism, we no longer try what was once called the noble experiment of prohibition. If the war in Southeast Asia is a mistake from which we are even now extricating ourselves, is it just that we should punish those who—at whatever cost—helped alert us to and dramatize that mistake?

For almost a decade now our Nation has been sorely afflicted. The material wounds are not as grievous as those inflicted by the Civil War—not for Americans anyway—but the psychological and moral

wounds are deeper, and more pervasive. Turn and twist it as we may, we come back always to the rootcause of our malaise, the war. If we are to restore harmony to our society and unity to our Nation we should put aside all vindictiveness, all inclination for punishment, all attempts to cast a balance of patriotism or of sacrifice—a task to which no mortal is competent—as unworthy a great nation. Let us recall rather Lincoln's admonition to judge not that we be not judged, and with malice towards none, with charity for all, strive on to bind up the Nation's wounds.

Senator KENNEDY. Thank you very much, Mr. Commager. That is an enormously helpful comment and statement. I think the benefit of insight of history is of great value to all of us on this committee and I think to Americans generally. I want to express my appreciation for your making it.

Let me ask if I could what your general view of amnesty today would be? Do you favor an unconditional amnesty today or do you favor an unconditional amnesty at the end of hostilities or when the American prisoners of war return? Do you favor conditional amnesty prior to the time that you see an end of hostilities? Given this kind of philosophical background, where do you come out?

Mr. COMMAGER. As I have said, I do not think conditional amnesty is meaningful. It is not forgetfulness, it is not oblivion, it is not the things our society needs. I therefore favor total amnesty. If we are to wait until the end of hostilities, we may have to wait generally until those who might otherwise profit from amnesty perish of old age.

Quite aside from that, I think our President has given clear indication that he proposes to end the war as fast as possible, to withdraw as many of our ground troops from Vietnam as possible. While overtures to China indicate a real desire for a new policy in the Pacific and in Asia. In the circumstances, it seems to me that an unconditional amnesty now would be in harmony with the presidential policy and with that policy which I believe most Americans now subscribe to.

Senator KENNEDY. Let me just, if I could, make a point that I think was suggested in Mr. Tarr's testimony yesterday. That would be if you provided an unconditional amnesty today while you have a continuation of the draft, would it not be possible for a young person who receives a draft notice just to go across to Canada, pick up his unconditional amnesty, and come back into the United States and be free of any kind of military obligation.

Mr. COMMAGER. It might indeed, sir. I believe, however, the draft has been suspended for 3 months. If we are indeed going to reduce our forces markedly in the Far East, reduce them even in Taiwan, as we now learn, and probably in Europe, as we have greatly increased the pay-scale for military service, I think it highly probable we shall go on a Volunteer Army basis. I hope so in any event and I think almost anything that could contribute to that would be desirable.

Aside from that, however, I am deeply suspicious of hypothetical reasoning—what Mr. Tarr, I believe, indulged in. President Jefferson once said, "shake not your raw head and bloody bones at me."

Do not conjure up all these dreadful things that are going to happen if something else happens. They usually do not and I do not believe that our society will unravel, that the military would come apart, or even that volunteers would cease to volunteer, or that all draftees would cease to respond if amnesty were to be promised.

Senator KENNEDY. As I understand from your comment, you would grant the amnesty to those who have deeply felt moral, ethical, or religious reservations about the war and your amnesty would not apply just in a broad sense to just any evader or deserter despite what motivated him to leave this country?

Mr. COMMAGER. I do not think there is any right answer to that question Mr. Senator: that is true of most hard questions. If what we want to do is achieve a kind of abstract justice so that everyone who is offended gets his punishment and those who have not offended are excused from punishment, the proposal if it is indeed a proposal, that you phrased is of course reasonable. If the objective is, however, to restore harmony, to wipe out dissension, to reduce those hatreds and antagonisms that are tearing our society apart, I think we cannot pick and choose in this fashion. I think we must do what Mr. Lincoln was prepared to do, what Mr. Jefferson and so many other Presidents were prepared to do—to wipe the slate clean and start over without looking too closely into the degree of sin and of fault. This seems to be the religious, the deeply Christian view of morality: the view that parents take with children, that husband and wives take, that is required not only by some abstract virtue but by the desire to achieve the end you want, which is peace, and harmony, not some abstract judgment of degrees of inequity and degrees of punishment.

Senator KENNEDY. Well, the example I was thinking of was suggested in Senator Hart's example yesterday of those that might have fled and gone to Canada because they had their hand in the company headquarters till, so to speak.

Mr. COMMAGER. Quite right. Whether it is worth while doing what the Roberts Commission recommended for 15,000 people—that is, taking every case on an individual basis—or not is very hard to say. My guess is that that would cause more trouble than it would be worth. Obviously, no one is in favor of giving amnesty to people who did not plead conscience or who did not indeed have conscience. But how one discovers these and how one decides between genuine and not genuine is another matter. Certainly no amnesty should be given those who are charged with or guilty of other offenses.

Senator KENNEDY. Would you suggest, then, that perhaps a way of proceeding would be the granting of amnesty and then the burden for some kind of prosecution would rest either with the army or the Justice Department to show that there had been other kinds of crimes or offenses?

Mr. COMMAGER. Oh, yes, I imagine there is a record of these, and perhaps those who fled are already under indictment of some kind. And I think to go at the case by case with—the 70 to 100 thousand who at one time or another deserted—and equal numbers who fled may commit us to more than we are prepared to carry through.

Senator THURMOND. Mr. Chairman, the Judiciary Committee is

having a full committee meeting at 10:30, so I will have to leave at this time.

Senator KENNEDY. Could I just ask one question before yielding to Senator Hart?

Could you tell us as a historian what kind of country we would have or what the atmosphere would be within this Nation if we did not take an understanding and a tolerant and a merciful view of these young people who left the country as a matter of deep conscience? What can you say about the kind of climate and atmosphere that we might find ourselves in in the United States?

Mr. COMMAGER. I do not know that a historian has any better credentials on that kind of prediction than a Senator has. I am inclined to think, however, on the basis of the experience in the American States after the Revolution, on the experience with radical reconstruction of the South, and of other countries which have taken vengeance on those who deserted or were guilty of treason, that the consequences would be deeply disturbing and that we would later deeply regret them. I fear they would be consequences which would leave a stain on our history. It is always better to forgive than to take vengeance and our society is, as all of us know, now deeply torn. It has been torn for 10 years. It is torn not only on the issue of the war, but on the issue of race, which closely connects with the war. It has torn hostilities within our great cities. We should be ready to pay any reasonable price to restore harmony, to win once again the confidence of the American people in the wisdom and the generosity of their government, to reknit a society which is in danger of unravelling. I do not think granting amnesty to all deserters and draft evaders alike, however unfair it may seem to be to some, is too high a price to pay.

With respect to this feeling that comes up again and again, that some make a great sacrifice and others do not. I think there are two observations. Just obviously going underground, leaving home, leaving country, giving up work, living from hand to mouth, wondering what will happen to them, is itself a great price to pay for dissent. And, second, I need not remind you, Senator Kennedy, that the parable of the workers in the vineyard is not wholly irrelevant, that those who came in the last hour and received the same compensation as those who came in the first. Perhaps we would not go too far astray in adopting that philosophy in this situation.

Senator KENNEDY. Senator Hart?

Senator HART. Mr. Chairman, I must leave to attend that committee meeting. I just wanted to thank Professor Commager for helping all—at least helping me shake down some of these what you would suggest are almost footnote kind of questions—how do you accept, when do you do it. I want to thank you very much for suggesting that there are not any wholly satisfactory answers to those things.

Mr. COMMAGER. There are not, nor to any problems in life, I fear.

Senator HART. Parenthetically, I still do not understand that parable you mentioned. I do not need it to persuade me to amnesty. I have listened to that in a different setting than you, but they have never made clear to me just what was meant in that one.

Mr. COMMAGER. Well, perhaps, sir, we could substitute the familiar

"betwixt the saddle and the ground the mercy sought and mercy found." This is a very old concept in philosophy, literature, and religion, that we can forgive. God forgives; man, too, can forgive mistakes—if they are indeed mistakes.

I am not adopting the position of the distinguished Senator from South Carolina, but pointing out that even if you refuse to concede the validity or sincerity of conscientious objection, nevertheless, there is a case to be made for forgiveness, for an individual ground and from society.

Senator HART. To be specific, I have never understood, unless it was to suggest what we now describe as a minimum wage law, why somebody that works 6 hours would get no more than somebody who worked 1. But that has very little to do with the problem here.

Mr. COMMAGER. Yes.

Senator HART. Thank you, sir.

Senator KENNEDY. Thank you very much, Professor Commager. We appreciate very much your coming.

Our next witness is Mr. David Harris, former Stanford student body president, convicted draft resister who has finished a 2-year term. Currently working as an organizer with the people's union, which has placed on the California ballot a referendum on the war in Indochina.

Mr. Harris, we want to welcome you here before the Committee.

STATEMENT OF DAVID HARRIS

Mr. HARRIS. A short statement I would like to make.

As I understand it, this committee is considering the question of amnesty. If amnesty were granted, the obvious reason I am here is that I would be subject to it. In January of 1968, I refused to submit to induction into the U.S. Armed Forces. My refusal bought me a sentence of 36 months in Federal prison. I was released from the Federal Correctional Institution of La Tuna, Tex., in March of 1971 after serving 20 months of my original sentence. I am presently under the supervision of the U.S. Board of Parole and will remain so until July of this year, when my original sentence expires. My own history makes amnesty a very pressing question. I am now a convict. I have no rights or civil liberties as they are commonly understood. I have a parole officer instead. But I did not start out as a convict. I started out as a high school football player who believed everything he was taught in his classes about American Government. I believed in liberty and justice for all, I believed in peace and democracy and freedom and all the virtues that the American state recites in its own honor. I believed in them so hard that I discovered they did not exist.

Its hard to say when that discovery began, but it is easy for me to remember when it became obvious, because it was then that I decided to be a convict.

I decided to be a convict because I believed in the peace and justice and freedom and democracy I had heard some people talk about. I decided to break the law because the law obviously stood

between me and those things I had learned to want. Before you gentlemen decide to give or not give amnesty, I think you should understand why people such as myself become criminals in the first place. I cannot speak for thousands of young people in this country who now live outside the law, but I can speak for myself.

I broke the law for three reasons. First, the law defined me and all the people I knew as pieces of property to be owned and manipulated however the Government saw fit. We are not citizens making the decisions citizens make. We are chattels who receive orders. The law I violated makes all of us pawns whose lives and deaths are not even our own. Terms such as those, no matter how comfortably they are made, are unacceptable to people whose freedom matter to them.

And I did not make the law I violated. Neither did any of the people I know or see everyday and neither did any of the people I was locked up with. The law I was punished for breaking was a law made 2,000 miles away by men with power such as yours. And you are very few men. The rest of us live with little or no control over the situations we find ourselves in. What we live with are the embodied interests of a few people who are allowed to sit on top and look down while the rest of us must squat on our haunches and look up. To submit to those interests and the power they exercise is to destroy the democracy the law claims to defend. Democracy, it seems to me, is a practice. And if it isn't a practice, it's nothing. The law I violated is a witness to its absence.

But the law I violated isn't an abstraction, as we all know. The law was made to serve a policy. And it was that policy that made me into a convict. We are all living in an empire, a society that has attempted to extend its control over as many people as it possibly can. It, like all empires before it, has accomplished its ends in a very simple fashion. It destroys whatever opposes it. That policy invaded the subcontinent of Southeast Asia determined to dictate the terms that the Vietnamese, the Lao, the Thai and the Khmer people must live under. It meets the attempt of those people to control their own fates with battalions of marines and enough raw explosives to turn all of Indochina into barren craters and graveyards. The policy pursued itself without mercy. It sent Americans 5,000 miles away to deny an entire subcontinent of Asians their right to live and exist as human beings. Anyone who respects his own liberty and the liberty of others has no choice but to refuse to be used for such slavery.

For acting upon all those reasons, I became a convict. And needless to say, there are more pleasant occupations. For 20 months I lived inside the operation of American justice. I learned to live inside bars and cages, I learned to exercise my freedom in very small and very dank places. I watched the police beat, extort, control and deny myself and all my fellow convicts. I learned to watch my son grow once a month for 8 hours in a prison visiting yard under the eyes of the Department of Justice. I learned to live without the simple rights that were supposed to be inalienable in my birthright. And I learned to wait for doors to open and lights to come on and for the screaming late at night to stop. And I don't

regret it. Given a choice between being a butcher and being a convict, I will choose convict every time.

And now you gentlemen are considering giving amnesty to people such as myself. To me, that means a lot. It means that thousands of young men like myself can walk out of their cell blocks and dungeons, return from their exile and their hiding places and walk on the streets like men are supposed to. I obviously have no objection to giving us amnesty. Of course it should be given. None of us should have ever been made criminals in the first place.

But I see some dangers in you gentlemen granting amnesty.

The first is that amnesty is traditionally considered an act of forgiveness and I do not feel like I have done anything wrong. Nor do I feel I want to be forgiven for the act I took. The wrong rests with the law and the policy the law enforces.

I spent 20 months on a maximum security cell block. There were two others in for offenses similar to mine. One burned draft files and the other refused induction. We used to talk about the possibility you men are discussing. And the conclusion we reached represents at least my feelings. We decided that we wouldn't accept a pardon but that we would take an apology.

The second danger I see is that I think it would be very easy for the U.S. Senate to find amnesty for an acceptable solution for people such as myself that have clear explanations for their actions and a constituency that you want to appease. But that you aren't nearly as inclined to give amnesty to the 19-year-olds who went AWOL because they were in love with the Chevrolet they left behind in Detroit. I think amnesty should be given to all people. I do not feel I can disassociate myself from those people any more than I can disassociate myself from all of the other victims of the policy the United States now pursues.

And the last danger I see is that I believe in giving things to those who need them most. Right now the people of Southeast Asia live under a death sentence. The policy that provoked my disobedience still flourished. It now uses machines instead of marines but it does the same thing. It is now massacring an entire civilization from 30,000 feet in the air. If amnesty is given, give it to Southeast Asia.

And the next day, after Southeast Asia has been spared from death by jellied gasoline and fragmentation bomb, release the rest of us from all the cages we've been put in and let all of us set making the nice words we recite into realities that live and breathe out where people live and not just in the documents we left behind 200 years ago.

[Applause.]

Senator KENNEDY. Mr. Harris, we appreciate your appearance here. The thrust of these hearings is to consider the administrative remedies that are available to a President as compared to the legislative remedies, also it is to try at least to provide an opportunity for those of us in the Congress, and most important of all, to the American people, to have an understanding of the depth of feeling of people like yourself who have had such a personal experience and are speaking with such conviction on this issue.

What are you suggesting to us as to what you would like to see in administrative action?

Mr. HARRIS. Well, I would like to see a series of actions I think, that run in this order. First, I would like to see the withdrawal of all American military presence from Southeast Asia. I think that that military presence is what creates people who need amnesty. It seems to me the first thing you want to do with amnesty is limit the number of people who need it and to continue that policy is simply to make more and more people who need amnesty.

I think secondly that a general amnesty ought to be declared for all people who have refused to be inducted into the Army who are either in prison at this point or in court processes or under the authority of the U.S. Board of Parole or who are in Canada or in hiding in the United States. I think to extend that amnesty to all those people who are in military prisons at this point, regardless, I think, of what crime they are in those military prisons for.

I think it would be a mistake to assume that, let's say, for example, that there is a man inside a military prison who is in there for stealing \$20. I do not think you can divorce the fact that that man stole the \$20 from the policy that he was supposed to be a tool of or the institution he was a part of. And I think the policy of trying to except those people out from each other is a process that is endless and possibly a proposition that is unjust. So I think we should extend general amnesty to all those people in military prisons as well and wipe the slate clean.

Senator KENNEDY. If you would follow that policy, you would close down all prisons.

Mr. HARRIS. For those of us who have been in prison, it is not all that bad an idea. I do not think the American people are served by the Federal prison system I experienced or any State prison system that I experienced as well. I do not think it's that bad to consider.

Senator KENNEDY. But I was trying to follow the logic of how you were identifying the two issues, those who, because of deeply held feelings and reservations about the war either suffered going to jail or going out of the country and those that steal a jeep and have fled the country. I must say I see a rather distinct difference. I am interested in the fact that you feel that those that have either stolen a jeep or are involved in other crimes ought to be treated the same as those who acted because of deeply held moral, ethical, or religious beliefs.

Mr. HARRIS. Well, my feeling—first, obviously, I am not holding my breath waiting for the Administration to grant amnesty, and neither are any other people who would be subject to it. But the point I am trying to make is if one is trying to dwell with what it is that generates those crimes in the first place, if one is trying to get back from the point of simply dealing with the effects and trying to deal with the causes that might either send me to prison because of a deeply held belief or send another man to a military stockade for, you know, stealing a truck or stealing a jeep, I think the same policy is responsible for both. I am all for clear and articulated positions and I am all for people trying to act with the most

sense possible and I obviously do not steal trucks or jeeps myself. I am not trying to put myself in the position of someone who does not have the background of people in this room, someone who has not had college and obviously has not succeeded in high school, someone who has had the option of being on the unemployment rolls or going in the Army and he went in the Army and ended up, instead of perhaps taking an open political position, which he might not have even understood existed, stolen the jeep instead.

My point is that man should never have been in the Army in the first place, because the only reason he was in the Army is because of the policy being pursued in Southeast Asia. My point is the only reason for the crime is as a distinct result of that policy. Most human beings do not have articulated politics. They get put into situations and they try to respond to those situations as best they can and most people do not respond to them very well. They are spontaneous and tend to panic and I think those people ought to be included in that decision.

I think that what we will find is that is, not a whole lot of people, that we are not expending ourselves in a great direction to grant amnesty for those people, but I do think they should be included.

Senator KENNEDY. It is your position that an individual who does not like a law or does not approve of a law ought to be able to interpose his own view in terms of violating the law?

Mr. HARRIS. I think that any of us as human beings has to fall back on that option. I think it is one of the options that democracy rests upon. Not that I would envelope an abstract theory about it. What I would say is faced with a situation where the law demands that you do things that are unacceptable to you as a human being, you have no choice but to either give up your existence as a human being and obey the law or disobey the law, and I think the choice in that is clear, that you take your own existence as a human being. I am not sure one builds an abstract philosophy around it, nor am I interested in building an abstract political philosophy, but I think that is an option open. Had I had an option that would have allowed me to do the things in my mind rather than go to the penitentiary, I would never have gone to the penitentiary. Simply because of the consequences. I try to break as few laws as possible. When you start pulling down those 3- and 4- and 5-year sentences end on end, civil disobedience is too widespread—a fashion ends up being a life commitment in a way that you did not want to make a life commitment. Yes, I think people have that right and I think that duty.

Senator KENNEDY. Would you reject the idea of a conscientious objector status?

Mr. HARRIS. Yes, I started to fill out a conscientious objection or form and I got about half way down it. First I realized that I was trying to convince five men whose job it was to send people out to kill each other that I was serious about not killing anybody. And I really thought if there was a doubt about somebody's sincerity in the question of killing people, the doubt rested on those five men and not myself and I did not feel I was under an obligation to

prove to those men that I was sincere, I think because I do not recognize the right of those men to draft me in the first place. I do not think that the Government owns 2 years of my life.

For the last 9 years of my life, I spent it trying to build those things that I think are real. I started as a civil rights worker in 1963 with SNCC in Mississippi and I worked as an organizer for the National Farmers Union and I was Stanford student body president and I organized draft resistance and I did my time in prison and I continue to act in that commitment. So I think people are capable of acting for the kind of society they want without a government ordering them to do it.

Nor am I willing to admit that the Government has that right and that function. Plus to my mind, the question was not just about my own personal statement. I could have gotten the conscientious objector classification, probably, and gotten myself free of the problem of whether I wanted—I had to pull the trigger or not. But the problem seemed to me much bigger than whether I had to pull a trigger. The problem was an institution designed to force young men just like me all around the country to go out and do that. What I wanted to do was deal with that larger problem not just the problem of my own fate. I felt myself to be more of a conscientious objector more than the law allowed. I was not only conscientiously opposed to my own participation in the Armed Forces, I was conscientiously objecting to the existence of those forces that put men in the Armed Forces.

Senator KENNEDY. Thank you very much. I appreciate your coming.

The next witness is Mr. Martin Kelley, Gold Star Parent, 149 Draper Street, Dorchester. Mr. Kelley is 65 years of age, has two daughters, and a son who was killed in Vietnam in 1968. Mr. Kelley, even though we know you have lost a son in Vietnam, we appreciate very much your willingness to come here and talk about this question. I am aware of your position and I think it is a position held by many, many people. I think the American people are entitled to your viewpoint and all of us in the Congress want to hear your viewpoint on this as well. I want to thank you very much for your presence here and your willingness to come.

STATEMENT OF MR. MARTIN KELLEY, GOLD STAR PARENT

Mr. KELLEY. Senator Kennedy, I would like to straighten out a few facts if I might. No. 1, I am not 65, I am 48. I did lose a son in 1968, his name was Daniel Kelley. He was a member of the 1st Cavalry Air Mobile, killed in the A-Shau Valley and as of this moment is still in the A-Shau Valley.

The gentleman who preceded me mentioned democracy several times. I was unaware that this is a democracy. I somehow felt it was a republic, when we pledge allegiance to a flag we pledge allegiance to the Republic of the United States, not to a democracy. Democracy is majority rule, period. A republic is majority rule with a constitution and bill of rights to protect the minority.

And I would also suggest that the gentleman, when he made his choice between being a butcher and a convict, presented himself to me as a very sick, a very sad animal.

"Traitor," has been mentioned twice, as I understand it, in the past few days in exchanges between members of the subcommittee and particularly Senator Thurmond and yourself, Senator Kennedy. I do not wish to use the word, "traitor." However, I would use two words, "ambush," and "betrayal."

"Ambush," is a very deadly tactic that is employed generally in wars, the nature of which this Vietnam conflict is being fought. We have had words from two Members of this Senate, and I mention those names—yourself, Mr. Kennedy, and Mr. McGovern, both Members of the Senate of the United States, which talked of total amnesty, the righteousness of draft dodgers who have crawled into Canada, Sweden, and wherever else they could pull their heels in after them. But I would suggest by this definition of their righteousness, this high moral and honorable draft dodger group, it follows that over 2 million and a half Americans have now been labeled immoral and dishonorable; the over 55,000 Americans who have been killed in Viet Nam, some of who now rest here at home in America in their graves, some of whom have gone to Vietnam never to return. Combat troops generally in a war, particularly in Vietnam, can expect and are ambushed and are betrayed. But the moment before that ambush, they are alive, armed, and could have at least attempted to defend themselves.

However, our courageous political leaders are expert in the tactics of ambush, because after all, men who are killed in action can't hear these words, that try to destroy reputations, that attempt to destroy memories of honorable and dedicated men.

They have heard these words of condemnation before; they have heard them many times from men such as the man who preceded me; they have heard them from Hanoi, they have heard them from Peking, and they have heard them from some groups in Canada. They have heard them from Laos, Cambodia, Viet Nam. And now without shame, these words are heard in this country. Indeed, heard from the mouths of men who passed laws sending them to their deaths in Viet Nam with the very casual statement, "Well, we were wrong and they were right;" men who have been several years predicting America could not win this war, America was losing the war, America must stop bombing, America must withdraw, America was engaged in an immoral and an illegal war, America was engaged in a racist war.

Do you wonder why the American people try to determine who wrote the script—Hanoi, the New York Times, maybe CBS or NBC? It was a no-win war because of restrictions placed upon the military. Who placed them and why? Fear of China coming in, Russia coming in? Maybe. But if China or Russia, or both, decided to come in, they could and they would manufacture an incident without any problem.

I believe that this war is as moral a war as this country has been in and I believe that the young men and the military forces serving

in this war were and are as honorable and as courageous as any this country has ever known.

And let me repeat, as honorable and as courageous as any this country has ever known.

I would add one sentence: I make no apologies to any man for these words I have just spoken.

Now, the purpose of this Committee, or subcommittee, was to decide whether or not we would grant blanket, total amnesty. I would suggest, number one, this Committee would be better engaged in suggesting and designing a memorial to the over 50,000 military men who died believing in this country's cause. Now in Viet Nam men are being wounded; they are being killed in Viet Nam; and we sit here with stinking empty platitudes, great philosophical flights. I would suggest perhaps that these discourses on philosophy might better be held in an upholstered outhouse, not here.

It is difficult for me to understand, to look, to know why someone would suggest total blanket amnesty.

I have not suggested that I am against the proposal that Senator Taft mentioned some time ago, which was conditional amnesty. But I do not feel that this amnesty, conditional amnesty, should be held, suggested, or put into effect until every American serviceman has left Viet Nam. And it is my thought and it is my suggestion that every American military man in Viet Nam should leave tomorrow, because they cannot win. This Government will not let them win.

When I hear the empty phrases of a Fulbright, of a Mr. McGovern, with the turn about of yourself, Mr. Chairman, when for 3 years, John F. Kennedy stood in the White House—John F. Kennedy who talked about bearing any burden, paying any price, et cetera. These words led men to join the Army, to accept the draft, and to fight for their country.

And now, with a very casual statement, "Well, we were wrong; these draft dodgers are right."

That is all I have to say.

Senator KENNEDY. Mr. Kelley, you have given us very powerful testimony this morning. I know that you speak from your heart and you speak with great concern; you have obviously given this a great deal of thought and there are many Americans who share that view.

Mr. KELLEY. I would apologize to this committee for two reasons. Number one, I did have, as was requested, 25 copies of my statement. In my rush to leave Logan Airport, the copies were inadvertently left at the airport.

Senator KENNEDY. You have done very well without it.

Mr. KELLEY. I would like to say to the people in the chamber that I am here only through the graciousness of Senator Kennedy. I did approach his Boston office; I did approach his Washington office; I did explain my stance.

They know exactly what my position was, maybe not the words contained. But they still, however, made every arrangement to see that I got here, were aware of the time and at every instance have treated me well.

Senator KENNEDY. Well, it is very important that all of us in this committee and the Senate understand it, Mr. Kelley. You have expressed that viewpoint as well as I think it could be expressed and I want to thank you very much for being down here with us this morning and for speaking to us the way you have, from your heart and as a concerned American and as someone who has suffered grievously.

I think the only point I would want to make at this time is in the references you made in terms of the courage and the commitment and the bravery of the young men who are serving in Southeast Asia. As long as I have been in the Senate and as one who has had serious reservations about our policy, as you well know, and have expressed them—as one who has visited Viet Nam on two different occasions and spoken about it, I do not think that there is any Member of the Senate—certainly not myself—who for a moment has anything but the highest admiration and respect for the American fighting man in Vietnam and who does not believe that he was carrying out his responsibility to the best of his ability and with the greatest patriotism and commitment to his country. I think the real expressions of reservations have been about the political leaders that sent them there and that continue to keep them there.

Mr. KELLEY. And I feel that these political leaders that did send them there and these political leaders who were there when the Southeast treaty resolution was signed, referred to as the Tonkin Gulf Resolution, I would remind the Senator that the vote in the Senate, as I understand it, was 88 to 2. I think Senator Morse and Senator Gruening, then Senator from Alaska, were the only two who declined and it passed unanimously through the House.

When I suggested the courage and the honor of the men in Viet Nam were being challenged, nobody can dispute that it has been challenged and in particular when from what's referred to as the so-called liberal press, immediately after—shortly before—the My Lai incident broke, we now hear terms such as Junkie Johnny. The gentleman preceding me has a choice between being a butcher or a convict. Those are the things I am talking about.

Certainly there have been many articles in the national newspapers and I am sure you are aware of them, there are men on college campuses that are perhaps looked upon as a strange breed of animal. Indeed they may be; in that particular campus; because the campus frankly does not know what courage and honor mean. I am talking about many, though not all of the participants in the mislabeled movement, the antiwar movement, and I would say the mislabeled movement which is called the peace movement—

Senator KENNEDY. Well, I think in fairness to my colleagues—I have heard, certainly not all of their speeches, but I have heard them debate and discuss the war. As a father, I would want you to realize that never on the floor of the U.S. Senate have I heard anything but the highest regard for the men ordered to Vietnam. I do not question that there are others who write about it or other groups or other people.

Mr. KELLEY. I am talking about two Senators who spoke on a radio station in Boston which I can name if you need, WBS. I am

talking in particular about Senator Hartke, I am talking about Senator McGovern, I am talking about what is laughingly referred to as a priest, Congressman Drinan, who have made statements much to the effect that the American fighting man is something less than a man.

Senator KENNEDY. I was interested in one of your final observations about getting the Americans home now. In speaking as one who has expressed those views about the war for a number of years—not as long as I perhaps should have—but I suppose that what concerns all of us is that we do not lose another American life over there.

Mr. KELLEY. I think that should be of prime consideration.

Senator KENNEDY. I know you have lost and you have suffered grievously. As I have the highest regard and respect for the position you have expressed here, I would hope sincerely that you believe that many of us in the Senate who have spoken about the war are equally concerned about insuring that there are not other fathers such as yourself who are going to have to lose sons.

Mr. KELLEY. The reason I am surprised, Senator Kennedy, is within the Constitution with regard to Congress, they, of course, can and do raise money to support an army. This can go on for a period of 2 years. At the end of those 2 years, they then have to acquiesce. As it were.

Senator KENNEDY. That is right.

Mr. KELLEY. This has been going on for quite some time.

Senator KENNEDY. I think that is a fair observation. You can say, well, if the Congress was so opposed to it, it should have cut off the military appropriation, and there are a number of people who share that view as well.

Mr. KELLEY. That is right.

Senator KENNEDY. Well, as I say, Mr. Kelley, I want to thank you very much. You are a forceful spokesman for a viewpoint. I know it is very sincerely held. You have given us very helpful and useful information. I want to thank you very much for coming.

Mr. KELLEY. Thank you for your consideration, sir.

Senator KENNEDY. Is Mrs. Valerie Kushner present?

(No response.)

Senator KENNEDY. Mr. Everett Brown Carson?

STATEMENT OF EVERETT BROWN CARSON, FIRST LIEUTENANT, MARINE CORPS, RETIRED

Lieutenant CARSON. Senator Kennedy, I would like to thank you for this opportunity to come today to speak on behalf of—well, on my own behalf but in behalf of the men who served in Vietnam.

I would just like to present my remarks with a brief response to the gentleman who just spoke and to his comment that the service of Americans in Vietnam was courageous and honorable. Certainly in a manner of speaking, that service was courageous and honorable, however misdirected. I would only like to add to that that we feel no pride—at least I feel no pride—in the part that I took in that war, and that however courageous or honorable that service may

have seemed at the time, in retrospect, there is very little of that feeling left.

We are all only too painfully aware that the war in Indochina is not over. American ground troops are being withdrawn at a steady pace. The number of Americans coming home each week in flag-draped caskets has dwindled to an almost unnoticeable trickle. It is difficult for "the enemy" to kill a computer technician in Thailand or a B-52 bombardier. The war has changed in character, but it continues. The complexion of the casualties has changed but I wonder if there is any less grief in the family of a young Laotian killed in an American air raid than in the family of an American soldier killed in a Vietcong ambush. A compassionate view of both situations makes us realize the universality of the suffering caused by this war.

Certainly, though, we must realize as well that those wounded or killed are not the only victims of this war. The whole of Indochina has been devastated in a fashion unparalleled in human history. Our own country has been ravaged by neglect of the problems which have faced us at home while we poured so much of our strength as a nation and a people into this war. The total cost will never be known.

Significant aspects of the toll which the war has taken within this country can be seen in any inner city in America, on any Indian reservation, in any prison, on the unemployment lists, in drug rehabilitation centers. In a very real sense, all of the people involved in these places are victims of the war.

The one group of men who said "no" to that war, and to those consequences, are also victims. They are victims not because they have committed any crime, but because they did not, because they refused either to be trained to kill or to actually kill their fellow human beings. Whether they evaded the draft or fled the military service instead of going to Vietnam is not really the issue. Some knew sooner than others that they could not contribute to the atrocity in Vietnam. All are now exiles from the country whose people have, in the final analysis, decided that Vietnam was a horrible mistake.

It seems that the bitterness of a confused society will now descend upon these men as we enter into discussion of the question of amnesty and repatriation. Many in our society assert that those men should be punished for shirking their duty as U.S. citizens. Many say that amnesty must seem particularly distasteful to those men who actually went to Vietnam, to those who were wounded there, to those families who lost a son or a father.

I served in Vietnam and Laos as an infantry platoon commander with the Marine Corps from October of 1968 until February of 1969. Three years and 2 days ago I was wounded and began the journey home. I had some of the finest young men I have ever known in my platoon. I cannot help but feel that under different circumstances they would have contributed tremendously to the quality of life for their fellow men. I regret that some of them will never have that opportunity.

I saw first hand what the war has done in Indochina. I have seen enough suffering, division of peoples and families, and broken

bodies and spirits to last many lifetimes. The question of amnesty and repatriation is central to the reuniting of the divided spirit which exists among our people now, and will continue to exist until we put away not only our war machinery, but also our war mentality.

While it is true that those men broke a law, is it not also true that they obeyed a far higher moral code? Actually the word "amnesty" implies that a crime has been committed, that a pardon is in order on those grounds. I would ask what definition of "criminal" is being used when it is applied to a man who refuses to participate in a war which is itself a crime against humanity.

Amnesty is also being considered only in conjunction with some form of alternative service, if and when the resister or deserter agrees to come back to this country. I see two very basic flaws in this proposal. The first is that the resisters themselves have stated openly and repeatedly that they are not interested in such an arrangement. They feel that they have committed no crime, and that alternative service or other punitive measures are totally unwarranted. It is of little consequence for lawmakers in this country to draft such a proposal if it will have no effect on the status of the exiles. I believe that it would serve only to further alienate them.

The second flaw is one which needs to be understood in a sympathetic way by the American people. No young man willingly and readily exiled himself from his family, friends, and country. To refuse induction into or to desert from the military is not an easy decision. The time which these men have spent in exile has not been especially pleasant for most. Jail is not pleasant either, as David Harris told us. But the alternative to jail or Canada for these young men—that is, taking part in the war—was unthinkable. Their dilemma, and their separation from home under such stress constitute hardships which few of us would be willing to undergo for any reason. To attempt to impose alternative service on top of this experience could serve no constructive purpose.

I had been back from Vietnam just over a year when the events of spring, 1970, occurred on college campuses across the country. I remember vividly how stunned I was at the news of the killings at Kent State, and again by the deaths at Jackson State. Violence had been a way of life for me in Vietnam, and the thought that the violence abroad was breeding violence at home was sickening. The hatred and frustration which was being nurtured by the existence of the war had finally come into full blossom. The unmistakable reality of what we were doing to ourselves as a result of Vietnam was in plain view.

I cannot help but fear that the many years of this war, the constant exposure of all of us to the killing and the body counts, the politicization of the issue, and our apparent disregard of the lives of our fellow men have driven all compassion from the soul of America. The effect of these years of callous acceptance of war as our main instrument of international policy may have had a far deeper and more profound impact upon us as a people than we ever dreamed possible. We may now be incapable of seeing that it is those of us, like myself, who supported the war, or stood by and watched

the killing, who have committed the crime which indeed requires amnesty. It is not those men who refused to condone the destruction of the Indochinese peoples. It is our leaders who sold us this war, and we, the people, who bought it.

If there is any good to come from this tragic episode, it is that we may have the humility to admit that we were wrong, as we have partially already done, and to welcome home those men who dared to say with their lives what we oftentimes even fear to speak:

"No more war. I will not kill my fellow man."

Senator KENNEDY. Let me ask you: you served, as you pointed out, as an infantry platoon leader with the Marine Corps in Vietnam and Laos from October 1968 to February 1969, and you were wounded. How do you react to the fact that while you were over there sludging around in Southeast Asia, and suffering in an Army hospital, that there were these other people that had gone over to Canada or Sweden and were escaping the risk you had assumed and which your close friends, had assumed? How do you react? Are you not bothered by that, that they ought to be able to effectively get away with some kind of amnesty?

Lieutenant CARSON. I think, undeniably, each of us realized much sooner than others what the war in Vietnam was all about. I grew up with much the same kind of homelife that David Harris did. I come from a conservative background and was led to believe in the kind of slogan which I guess is best represented by "My country, right or wrong."

Senator KENNEDY. Where were you from?

Lieutenant CARSON. I grew up in Virginia.

Senator KENNEDY. What community?

Lieutenant CARSON. Lexington.

Senator KENNEDY. How big a community?

Lieutenant CARSON. About 7,000 people.

Senator KENNEDY. You went to school there?

Lieutenant CARSON. Yes.

Senator KENNEDY. High school there?

Lieutenant CARSON. I went to high school in Alexandria, at a place called Episcopal High School, a boarding school.

Senator KENNEDY. Then did you get some college training?

Lieutenant CARSON. I was in college for about a year and a half and was frankly very confused by the issue. When I dropped out, the only course of action, really, which my background and my current conviction allowed me to take was to go into the military service.

But I was in Vietnam, I guess, only about 2 days before I rode through the village, the resettlement village of Cam Lo, on my way out to join the unit to which I had been assigned. I realized then and there to some extent what the war had done to the Indochinese people.

I testified last spring before your own committee on refugees to the conditions in that village and I do not think they need restatement; they were horrible.

Senator KENNEDY. I am more interested in you as a spokesman as someone who served in the armed forces and received medals—the

bronze star and the Navy achievement medal and the Vietnam service ribbon, the purple heart and a couple of others. I am interested in what your attitude is about those who did not serve in the armed forces, and has been argued here by some, that took the easy way out. Do you not think that you got the short end? While you were over there suffering, losing your buddies, other people were leaving the country. Do you not resent that? Do you think that the Congress and the President ought to take a policy of leniency for them or mercy toward them? Are you not bothered by that?

Lieutenant CARSON. I think that for these young men to have refused to impose the kinds of conditions upon the Indochinese people that I as a participant in the Vietnam war imposed was a high moral conviction, which I certainly can't condemn. I do not think that any of us who have seen both the suffering in Indochina and the suffering here at home as a result of the war would wish any more suffering, either on the people who have exiled themselves from this country or upon their families.

I do not think that there is a single family who, with deep thought, would deny the reuniting of other families whose sons have gone to Canada or gone to jail or gone to Sweden.

I left many friends in Vietnam and I regret that. I would do absolutely anything to get those people back. But I also left friends here, and there are others in this country who feel the way I do, that to punish someone for high moral convictions when we realize that what we did was a mistake and is really a violation of morality, in itself would be a crime. I do not think that many of us who served in Vietnam would wish any more suffering on this already incredibly divided Nation of ours, and that to reduce the debate and the discussions of amnesty to one of bitterness and vindictiveness and to deny the reuniting of the Nation as a whole would be only to extend the suffering that we have seen in Vietnam and the suffering that we see in the ghettos and everywhere here at home.

I think it is extremely difficult for a Vietnam veteran who has gone and then come home and who once believed in what he was fighting for to have that belief devastated when he sees what it is doing. They are devastated.

Senator KENNEDY. There are people who say that those who left are law violators, law breakers and cowards. How do you react to that?

Lieutenant CARSON. I would react by saying that the law that was violated was one that never should have been made and that the policy in the Southeast Asia, as I think most of us are more than ready to admit right now, is also a policy which never should have been made; and that for a person to refuse complicity in that crime against humanity is an admirable feat for many to have accomplished and certainly not a feat which he should be punished for.

Senator KENNEDY. You are a student now at Bowdoin College?

Lieutenant CARSON. Yes.

Senator KENNEDY. How much longer do you have to go?

Lieutenant CARSON. I graduate in June.

Senator KENNEDY. Do you have any idea what you are going to do after graduation?

Lieutenant CARSON. I would like to teach in high school.

I have perhaps one incident which happened to me about 3 weeks ago that I would like to add. I went with the American delegation to the Paris World Assembly for the Peace and Independence of the Peoples in Indochina and I met there the people of South Vietnam, the people of North Vietnam, the people of Cambodia and Laos, whom I never had an opportunity to meet while I was in Indochina, obviously.

During one conversation with a gentleman from North Vietnam, he sensed my uneasiness at the fact that I was a veteran, at the fact that I had been there and participated in the destruction of his country, and he stopped me right in the middle of a sentence, and he said, "I realize that you are uneasy talking to me, coming from the kind of perspective that you do. But I consider that since you feel the way you do now, you have always be my friend, that your past history is not important." I think this is the kind of sentiment which has been overlooked by all of us here in America, that for the most part, the Indochinese people are not fighting a war out of hate, they are fighting a war merely because they want their own country.

I think that the people, the young men who left this country, saw their own country coming apart at the seams and could not participate in that dissention and that is why they left, because they loved their country and because they did not want to contribute to its destruction.

Senator KENNEDY. Thank you very much, Mr. Carson. We appreciate your presence here.

We had scheduled Mr. and Mrs. Robert Ransom, who are also two Gold Star Parents, who were going to testify. They have taken a different position from Mr. Martin Kelley. I guess Mr. Ransom is ill today so he is unable to be here. If he files a statement we will print it in our record.

Senator KENNEDY. Our next witness is Mr. James R. Kerns.

Mr. Kerns represents the Vietnam Veterans for a Just Peace. He was educated at the University of Washington, completed 2 years in the schools of art and science, served with the U.S. Army Special Forces from 1966 to 1969, served as a volunteer in Vietnam with the 5th Special Forces as an adviser to the Vietnamese.

He has been associated with the Boy Scouts Special Forces, the American Legion, Disabled American Veterans, American Ordnance Association, Vietnam Veterans for a Just Peace, U.S. Army Reserve, and a number of other activities.

We appreciate your presence here.

STATEMENT OF JAMES R. KERNS, VIETNAM VETERANS FOR A JUST PEACE

Mr. KERNS. Thank you, Mr. Chairman, members of the committee, fellow veterans, ladies and gentleman.

First of all, I was going to give a brief history of myself, but Senator Kennedy has already done that. I would like to say to the committee that I appreciate having this opportunity to testify and that our organization, the Vietnam Veterans for a Just Peace, some

8,000 veterans in this area, the Southwest area, and that we are not pro-war, we are pro-people. Being pro-people, we have compassion for the suffering of the Vietnamese and we are for a truly lasting and just peace in Indochina; one that is worth what it cost this country.

I might add, too, Mr. Chairman, that we are for peace in this country as well because it seems that the repercussions of this war are going to go on for a long time to come.

As you said, I personally served in the Republic of Vietnam with the 5th Special Forces group and as a reservist, my introduction to war was fairly abrupt. Four days after I put on a uniform, I was in Bien Hoa, Republic of Vietnam.

A month after that, I was on patrol in the Mekong Delta. And in my capacity as advisor to the Vietnamese irregular forces, I learned to identify with my Vietnamese and I learned to share their failures as well as their successes.

But, really, Mr. Chairman, we are shocked and we are dismayed that you are holding these hearings now while Americans continue to fight and die in the mud of Vietnam. It is an irony that some of the politicians who primed us for this war with showing answers about commitments to freedom and the right of self-determination of the 17 million people in Indochina are now championing the cause of those who thumbed their nose at them 6 years ago. We feel that this discussion of amnesty at this time encourages desertion and even worse, makes the efforts of those who continue to risk their lives subject to ridicule.

Senator KENNEDY. Let me ask you just at that point. I have had the opportunity to visit a number of schools and campuses in my own State of Massachusetts. I would say during the Christmas break probably eight or nine colleges and 30 high schools. I do not think there is one school that I went to that I was not asked about amnesty by any of the young people. I would just say, and certainly others might have a differing viewpoint, but I would say that young people are more interested in this issue, as well as those related to the end of the war, than perhaps any others. Do you find it different? And I am just wondering if that is the case and if they are interested in a public issue, should public figures try to inform themselves more responsibly about such an issue, or just say that is a terrible thing to discuss or even think about and therefore, we will not either inform ourselves or educate ourselves about it or try to listen to different viewpoints like Mr. Kelley's?

Mr. KERNS. Well, Mr. Chairman, I am certainly not opposed to freedom of speech and discussing the issues. And I think as long as these issues and discussions of these are kept within the framework or the knowledge that we are at war and that there are people who are dying and that we do have the national interest that comes before other interests, I think this is well and good.

And we, too, have been to different high schools and different universities. One thing I have to take issue with you on, Senator Kennedy, is that I find now on campuses that people care less. I find that generally, when we have our teach-ins or seminars, students want to get back to class, much different from when I returned a year and a half ago.

Senator KENNEDY. Sure, but does that reduce our responsibility of at least having an opportunity in the Congress or the Senate of the United States to hear these different viewpoints and addressing ourselves to this issue? In a free society, is that not what we are supposed to be about, hearing these different viewpoints and expressing, at least, some kind of comment about it?

Mr. KERNS. I agree with this, Senator, but we feel that with prisoners of war in Vietnam, every person here today and every other American as well must realize that this has a very detrimental effect on the prisoners. I mean the suggestions, speaking of things such as amnesty, have a drastic effect on the situations that these prisoners of war now have in Hanoi or wherever they are kept. And we feel that these men who so bravely fought and sacrificed for their country will be told by their Communist captives that some Americans here agree with the Communists and that they are war prisoners.

We have to keep in mind that when these people are captured, they are told by their Communist captors that they are not entitled to rights under the Geneva Convention because they are fighting in an undeclared war and that they are war criminals.

Well, they are not war criminals. North Vietnam signed the Geneva Accords and these people are entitled to the protection of proper treatment. And hearings such as these—and you know that they are going to be taped and played to them.

I would like to take license, Mr. Chairman, to read a letter here.

Senator KENNEDY. They are going to hear you, too, so they will hear your viewpoint expressed, too, hopefully. So that is useful.

Mr. KERNS. I will preface it with my "yes," Mr. Chairman.

This is a letter by Maj. Nick Rowe, and it is not a letter. This is out of his book, "Five Years to Freedom," which was published last year by Little, Brown.

Maj. Nick Rowe, of course, was also in Special Forces, and he was a—

Senator KENNEDY. Could I interrupt, Mr. Kerns, just at this point? That one light you see on that clock means there is a vote going on and I have to go over and vote. We will start with that quote if we can in about 6 or 7 minutes.

We will vote and be right back with you.

We will recess for 10 minutes.

(Recess.)

Mr. SCHNEIDER. The Senator has asked me to state that there are going to be three back-to-back votes and he will be unable to return until they are finished.

(Whereupon, the committee recessed until 1:30 p.m. this same day.)

AFTERNOON SESSION

Senator KENNEDY. The subcommittee will come to order.

I want to apologize to our witnesses. These votes are unavoidable. We had four of them back-to-back. It did not make much sense to interrupt your testimony, so I appreciate your patience in waiting.

Mr. Kerns, as I remember, we interrupted you in the middle of your statement.

You may proceed.

STATEMENT OF JAMES R. KERNS—Resumed

Mr. KERNS. Mr. Chairman, I begin my testimony again here with a quote out of a book written by Major James N. Rowe. Major Rowe was a captive of the Viet Cong for 5 years, and after he escaped from captivity he wrote his book, "Five Years to Freedom." It was published last year by Little, Brown.

I quote from page three of my prepared statement:

I began to form a picture of my country that was unlike anything I had ever imagined could happen. Could I have been so wrong about the cause I supported? Could the government have actually changed so much between the two presidents? The overwhelming opinion in the United States, particularly in the news I heard, was so anti-war, anti-government. Even though it was still coming from Radio Hanoi and the guards, the big change occurred in the sources. The communists no longer write their own English broadcasts; they merely selected from Western news agencies or from prominent individuals who were saying what Hanoi wished to put out.

Mr. KERNS. I can vouch for this, because while I was in Vietnam, on standdown, several times we listened to Radio Hanoi and Radio Peking and Radio Moscow.

These were not translations, either; they were statements made by American politicians that belittled our effort in Vietnam and generally made us feel that we were outsiders.

Mr. Chairman, for this reason, we do not think that amnesty should be discussed now, because it has a demoralizing effect on American prisoners of war. To go on and say that war is criminal and to say that Americans who fought in this war are criminals and that those who deserted and those who did not fight are good is not only to distort our purposes and our stakes and our achievements of the American effort in Vietnam; it is also to seal the fate of the American prisoners of war by denying them their status as men protected by international law.

My next point is that some conscientious objectors—Henry David Thoreau, for one—went to jail. Now, Henry decided they were not going to use his tax money to pay for an immoral war in 1848, so he chose jail instead. Not all conscientious objectors choose jail, of course, because our system of laws has offered an alternative service in noncombat roles, and since World War I, they have been innumerable conscientious objectors who have objected to the war and acted within the American legal system.

In a recent Supreme Court decision which has broadened the category of conscientious objectors by enabling objection to bearing arms on other than religious principles, there is a good indication of this. Many of these CO's—conscientious objectors—have served their country honorably in a noncombat capacity in Vietnam.

One such American, Milton Olive of the 173rd Airborne Brigade, was a recipient of the Congressional Medal of Honor. He also could have run.

We feel that the evaders and deserters are very different from conscientious objectors, and even between evaders and deserters, there is a distinction. The deserter is a military problem. He is a member of the Armed Forces. He has taken an oath to defend his country and as a member of the Armed Forces, he is subject to the

Uniform Code of Military Justice until such time as the Military relinquishes its authority.

Now, in discussing amnesty for evaders, we had better agree on what we mean by amnesty. Groups like the National Committee for Amnesty now are not talking of amnesty: they are talking of expungement. Expungement means that the record is wiped clean. They refuse to admit that any offense was committed. They refuse to assign any responsibility to those who chose to evade or desert.

Mr. Chairman, we feel that amnesty is an official act overlooking the seriousness of a crime which was committed by a group. A crime has been committed; there was guilt. Amnesty takes away the punishment for the offense, not the offense itself. After the Second World War, President Harry Truman established an Amnesty Board by Executive order. While this Board reviewed 15,085 cases, and they were all reviewed on an individual basis because they found that many of these individuals had been convicted, or were guilty of other crimes, they recommended only 1.52%, less than 1 out of 10, for amnesty.

In the Civil War, President Lincoln gave amnesty to the deserters if they reported back to their regiments within a month, and most of the other amnesties given after the war were given to those who had fought with the South, not those that evaded the draft in the North or deserted their regiments.

Responsibility and guilt are the basic issue here. We feel that these must be clearly established and that they lie essentially with those who refused to serve or who deserted. We want those who made such a decision to face their responsibility and not to run away from that also. We do not want to be closemouthed here and have our grandchildren read a history book that those who ran were excused and those who served were accused of fighting in an immoral war.

We want our grandchildren to know that we saw the Vietnam war firsthand and that we served proudly. We want them to know that we favor a settlement to that war and a responsible approach to those who served and those who ran.

We also want them to know that a great and generous Nation, as a magnanimous Nation, we at some time were able to overlook the transgressions of those who refused to support this Nation in time of need, but that we will not for one moment tolerate the transferring of their guilt to the country.

Mr. Chairman, in summation, we feel that this inappropriate talk of amnesty at this time does nothing more than distract from the real tragedy. That we can sit here so detached and so removed and offer freedom to those who actually championed their morality by pushing their guns in someone else's hands, possibly that very hand that is manacled to an animal cage somewhere in a Viet Cong-based camp, is unthinkable.

I shall be happy to answer any questions of the committee.

Senator KENNEDY. Thank you very much, Mr. Kerns. You have expressed your viewpoint very clearly and precisely. We want to respect that opinion.

I suppose the logic of your argument would apply equally well to those kinds of expression of reservations about our policy in

Southeast Asia, would it not? I mean those who have expressed opposition to the war policy; I suppose they would fall in your general kind of category of those who are aiding or assisting or abetting the enemy, would they not?

Mr. KERNS. Well, in the first place, Mr. Chairman, I have not accused anyone here present or anyone in the Senate of aiding and abetting the enemy. I would like to make that clear. I merely feel, we feel, that we have certain responsibilities in time of war.

Senator KENNEDY. All right. I was trying—let us direct your attention to your expression that we should not really be involved in talking about amnesty now because of the impact that that has on the American servicemen in Southeast Asia or South Vietnam. Am I right in gathering that is your feeling?

Mr. KERNS. Yes, Senator. I do not feel that we should be talking about it.

Senator KENNEDY. Because of the effect, the impact. Then, I believe you mentioned the fact that Radio Hanoi, instead of using propaganda, was in many instances using American political figures who express reservations about our involvement in Southeast Asia. Did you not?

Mr. KERNS. That is correct.

Senator KENNEDY. Well, what does that say about those of us in the Congress and the Senate that have very legitimate and sincere beliefs about our involvement and think it is a mistake, and do it with the same kind of sincerity in terms of their convictions that certainly I attribute to you and yours? Do you think that because of the fact that those views might be presented by Radio Hanoi, the Members of Congress or the Senate should not express themselves about their reservations on the policy and thereby be muzzled?

Mr. KERNS. Senator Kennedy, first of all, I would differentiate between talking about amnesty for deserters, while we are still fighting a war and your sincere right and your right as an American, and certainly as a Senator, to change your opinion of the war. I find it very difficult to understand how a war that was moral 6 years ago—and people like yourself who told us that to defend Southeast Asia was defending the world against communism and that this was our heritage and our destiny—6 years later, to say something entirely different.

Now, I do not question your right to say that, Senator, and I do not question your beliefs. I am saying this is all very confusing and I think possibly this confusion has led to the reason that we have 70,000 people that have left this country, because they are truly confused. And I was confused in Vietnam when I heard your voice over Radio Hanoi.

Now, I know, certainly, that you did not intend for Radio Hanoi—but I think we have to be aware of what we say, that these things are being twisted.

Senator KENNEDY. I remember those lines about conformity is the hobgoblin of little minds. Are we supposed to, if we see a mistaken course in our Nation, remain silent? You are not meaning to suggest that we should not change or express our views about something that we see is a mistake, are you?

Mr. KERNS. No, Senator: I am not. I think you are very much entitled to express your views as a Senator and as an American.

Senator KENNEDY. Sure.

Mr. KERNS. I, however, feel that this amnesty issue is something entirely different. As you said, we have 400 people accounted for by Hanoi. There are 1,500 people missing in action. We are talking about giving their freedom to someone who turned their backs on the country.

I believe, I feel—our group feels—that we are talking about a different issue.

As I said before, Senator, we feel that some time in history, in our tradition of amnesty, there is a place for amnesty.

Senator KENNEDY. Where is that?

Mr. KERNS. But not while we are fighting a war.

Senator KENNEDY. Where is that place?

Mr. KERNS. I would say a good start would be, Mr. Chairman, when the last American—combat, prisoner of war, and body—is brought back from Indochina. Then I think this is a very appropriate time to offer forgiveness.

Senator KENNEDY. Would you give an unconditional amnesty at that time?

Mr. KERNS. As I said in my testimony, Senator, I find it very difficult to recommend the unconditional amnesty on the grounds that some of these people have other criminal offenses.

Senator KENNEDY. Other criminal offenses? Yes, I do not think we are talking about that. But I am just talking about the question of those who have, based on a deeply held belief, reservations about the war. What about those?

Mr. KERNS. Well, Mr. Chairman, I feel that the people who had deeply reserved beliefs about the war and had beliefs and concern about the country—in other words, respect for the system that we live in, which is not an arbitrary system—these conscientious objectors have worked through the courts. Some of them have gone to prison, but they worked within the system.

The system is at stake and unconditional amnesty would imply that they are right and we are wrong, the Nation is wrong. And we can never accept the guilt as a nation, certainly not the 2½ million of us that fought in Vietnam. We cannot accept the guilt for this.

Senator KENNEDY. You do not think a nation can make a mistake like an individual?

Mr. KERNS. Do I think a nation can make a mistake?

Senator KENNEDY. Yes.

Mr. KERNS. I do not think this Nation made a mistake.

Senator KENNEDY. Do you think this country has ever made a mistake?

Mr. KERNS. I imagine it has. I do not hold to the concept that the country is infallible.

Senator KENNEDY. Do you not think that there are people who have sincere beliefs that the country was making a mistake about our involvement in Southeast Asia and felt that little farmers that were running little farms 10,000 miles away, living on land that their parents had had for a thousand years, not in any way threatening

our lives or our security, should not be subjected to the harshest kind of fire power?

Could you understand a young person who had rather serious reservations about that?

Mr. KERNS. I certainly can, Mr. Chairman, and I can certainly have compassion for people who have convictions. But like I mentioned before, we do not live in an arbitrary system; we live in a system of laws. We live in a very great country that has made provisions for people to disagree.

Senator KENNEDY. But take, since you mention the laws, take before 1970, for example. People who had a sincere reservation, but it was not based upon a religious belief, but was based upon a moral and an ethical belief, the Supreme Court did not recognize that before 1970. So they left the country.

Now, in effect, the Supreme Court has caught up to them and still they are outside of the Nation. And they are fugitives from justice.

What are you going to do about those people? You see, they would have qualified after 1970 as a conscientious objector.

Mr. KERNS. I realize that.

Senator KENNEDY. Now, they are either in jail or outside the country.

Mr. KERNS. Mr. Chairman, I would compare this with Prohibition. A lot of people went to jail during Prohibition and they are not jailing people for drinking now. It is the system. It is a system of laws and, I am sure, Senator, you realize this as well as I do. We have to abide by the law. That is why I went to Vietnam.

Senator KENNEDY. Is it not really the interpretation given the law? I mean, the Supreme Court interprets it—it might be the same law. It did not change between 1969 and 1970, except the Supreme Court said it had changed its interpretation.

Mr. KERNS. Mr. Chairman, I cannot believe that we are in a debate here between subjective reality and objective reality. I am sure that everyone in this room knows that laws are not made by the individual. We make our decisions, and if we are men, we stand by them.

Senator KENNEDY. Thank you very much. I appreciate your appearance here.

Mr. KERNS. Thank you, Mr. Chairman.

Senator KENNEDY. Mrs. Valerie Kushner?

Mrs. Kushner is a graduate of the University of North Carolina. Her husband is also a graduate of the University of North Carolina. He has been a prisoner of war for 4 years. Mrs. Kushner represents one of the thousands of families who have suffered in this war because of the impact on a husband or son.

We are pleased to have you with us today to help us resolve some of these differences, Mrs. Kushner.

STATEMENT OF MRS. VALERIE M. KUSHNER

Mrs. KUSHNER. Thank you, Senator Kennedy. I greatly appreciate the opportunity you have given me today to testify before this body on the question of amnesty. I am not directly or by personal knowl-

edge involved in the problems of those young Americans, who for a variety of reasons, decided not to serve in Vietnam. I am even more gratified to be here after hearing the previous testimony; over half of which purported to speak in my husband's name.

For I come to you as the wife of a man who voluntarily enlisted in the Army in 1966, who in 1967 chose to serve in Vietnam, and who has spent the last 4 years as a prisoner of war. But there is something to be said for the platitude which insists that the best teacher of compassion is personal grief.

The Americans who have been imprisoned by the enemy in Indochina and the draft dodgers and deserters share a certain area in common. Most noticeably, they are all unwilling exiles. There is not one among them who wanted to be presented with the choices which had to be made. In all cases, families have been separated and suffering has occurred. The lives of the men have been abruptly changed, and in many cases, rendered nonproductive. I am not here to debate the wisdom of decisions already made, but rather to encourage an attitude of tolerance toward the men who made them. As a country, we are also young and prone to error.

I would ask you to open your hearts to the words of Ecclesiastes: "To everything there is a season, and a time to every purpose under the heaven: . . . a time to kill, and a time to heal; a time to break down, and a time to build up;". We have had our time of killing and now we must prepare ourselves for the time of healing. We cannot expect to make whole the Body America if we amputate from her flesh so many of her sons.

The last decade has seen a tragic breakdown in many of our societal structures. If we are to begin the task of building up, we cannot deny ourselves the contribution of all who would participate.

The vast majority of the exiles still consider themselves to be Americans. Several years' residency in Montreal should not involve loss of citizenship any more than the same period of time spent in the "Hanoi Hilton." The refugees wish, as does my husband, the soonest possible return to the land which nurtured them and the memories of which sustain them in exile.

I've heard, again today in this room, it said that no amnesty can be given until the prisoners of war have been repatriated. I agree that neither will come to pass until first this terrible war is ended. But just as the Pentagon has formulated contingency plans for the return of the POW's, Congress must give thought to preparing the structure by which amnesty will be granted. It would be terrible, indeed, if the return of one young man was delayed because of bureaucratic unpreparedness.

I can only hope that such a plan will not seek punishment or retribution, but has as its guide, compassion. For compassion is the most soothing balm for healing and the strongest bond for building up.

Finally, it has been said that the young men who chose exile in other lands have betrayed their heritage and rights as Americans. I can only remind you of a passage by Stephen Vincent Benet. It is a favorite of my husband's and one he marked long ago:

Remember that when you say, "I will have none of this exile and this stranger for his face is not like my face and his speech is strange", you have denied America with that word.

Gentlemen, the question before this Committee and this Congress should not be whether or not these young men who departed from the majority have betrayed America. In all humility, we must ask ourselves, "Will America, by refusing amnesty, betray itself?"

Thank you, Mr. Chairman.

[Applause.]

Senator KENNEDY. That is a very moving statement, Mrs. Kushner. You have said a lot in a very short period of time. I just wish all the members of not only the committee but the Senate could have heard you. It was a very moving comment.

There is probably very little elaboration needed on any of your statement. I think that, realistically, it is highly unlikely that anything will be done until the end of the war and until the prisoners of war are back.

But how do you feel as the wife of a prisoner of war that the Congress and the Senate should even be thinking in these terms at a time when your husband is in a prison?

Mrs. KUSHNER. I am very glad, frankly, that the committee, that the Congress, and hopefully the people of this country are now thinking in these terms. I, like everyone in this country, am anticipating at some point a peace. When that peace comes, I do not think it will be meaningful in any way unless it is also accompanied by that necessary ingredient, good will. I think it is something for which we must prepare ourselves, and something which we must anticipate.

If, at the time when the end of this war comes, the people of this country go from area to area pointing accusatory fingers at each other, charging either betrayal on the one side or war crimes on the other, then it will indeed be something which will have destroyed the essence of America.

The war has been detrimental. It has hurt our country. But I would hope that embodied in the concept of our people and our Government still remains that spirit of good will which will unite us, permit us to rededicate ourselves, and to go on to better and higher destinies.

Senator KENNEDY. Does it bother you that the Senate is considering amnesty for young people who have, as has been stated here, violated the law of this country, are outside of the United States, but have escaped service in the Armed Forces of the United States at a time when your husband, who has served the country bravely, is separated from you in a prison camp?

Do you see inequities in this which have been pointed out, quite frankly, by a number of witnesses?

Mrs. KUSHNER. I do not see any inequity at all. I think my husband in a prisoner of war camp and a young man who has gone to Canada are equally victims of this war. My husband enlisted in the Army and went willingly to Vietnam because of a sincere belief in a certain obligation to this country, a sincere desire in some way to serve the country. Yet, I have to ask myself during these last 4 years that he has spent in captivity, of what service has he been to this country?

Senator KENNEDY. I think all of us can ask that from time to time. The people who voted to send him there should be asking

themselves that, too. It is not just a question that those who have lost loved ones in Vietnam should ask themselves, but I think the country ought to be asking itself that.

Do you have children?

Mrs. KUSHNER. Yes. I have a daughter who is 8, a son who will be 4 in April. He was born after his father's capture.

Senator KENNEDY. Are they well?

Mrs. KUSHNER. Yes.

You know, when Mr. Kerns speaks about telling his grandchildren all about the glorious day in Vietnam, the camaraderie and the fighting, and probably how many kills he had that day, I think of my children who have been scarred by this war through the loss of their father, and I can only hope and pray that when my grandchildren come around, I can say, yes; that existed, but this sort of thing does not happen any more.

Again, if any type of peace comes without the good will, the forgiveness, that we should have at that time, I am afraid my grandchildren, too, will be going to war.

Senator KENNEDY. Well, you have demonstrated an enormous sense of magnanimity and generosity and compassion about those who have been affected by the war. I think if the country or the people involved in public policy could share that compassion, our greatest days are still ahead of us.

I want to thank you. You are a very courageous woman.

[Applause.]

Senator KENNEDY. I next introduce Mr. and Mrs. Sam Kendall. Mr. Kendall is originally from Massachusetts, now resides in Richmond, Va. The Kendalls' son, the eldest of 13 children, Timothy, is now serving 4 years at Allenwood Federal Prison.

He was indicted for violating the selective service law.

I appreciate very much your willingness to come here and testify before the committee, Mr. Kendall.

STATEMENT OF SAM KENDALL, RICHMOND, VA.

Mr. KENDALL. I think it is important that we first try to understand what motivated so many thousands of young Americans to resist the draft laws. It is important that we do not make a predetermined judgment that these are impetuous children, acting on hasty decisions and bad advice. What decisionmaking process did they follow? How sincere are they?

Obviously, I cannot speak for all of them. I can, however, speak for one. My oldest son, Timothy Kendall, is a draft resister. He is now serving a sentence at Allenwood Federal Prison Camp in Pennsylvania.

Tim is 23 years old, the oldest of 13 children, and is a graduate of the University of Notre Dame with a degree in theology. During his senior year, Tim decided that he could not participate in any war, in any way—in the taking of human life. At this time, he intended to apply for the status of conscientious objector. However, for reasons which will be explained later, he changed his mind about this and made the decision to simply not cooperate with the Selective Service System at all.

His noncooperation consisted of the following steps:

1. He did not apply for renewal of his student deferment, thereby becoming classified as 1-A.

2. When ordered to report for his preinduction physical, he did not.

3. When order to report for his induction, he did not.

Tim continued on with his studies at Notre Dame. For reasons which are still not clear, he was not taken into custody. At the end of his senior year, his mother and I attended his graduation ceremonies, and when they were over, we drove home to Richmond and went directly to the Federal Marshal's office, where Tim turned himself in. Judge Robert R. Merhige set a trial date and released Tim without requiring bond.

Tim spent the next month writing a paper to be read at his trial. This paper set forth very clearly why he felt he had to do what he did.

Many of his friends, and members of the Notre Dame faculty, came to the trial to testify as to his character and sincerity. Tim was given the opportunity to read his paper in court. He was found guilty and sentenced to 4½ years in Federal prison. Three months later, Judge Merhige reduced his sentence to 2 years.

After Tim was taken to prison we made copies of his paper and sent them to many people in Government—in the church—and in the press. We wanted people to be interested enough to start asking questions, to start looking for answers and, hopefully, to start finding solutions.

We knew of Senator Kennedy's interest in the matter of the draft and draft resistance and amnesty. My wife, fearing that her letter to him might be overlooked in the press of urgent Government business, used a typical woman's approach and sent her letter to the Senator's mother with the request that she see that he got it and read it. Well, he got it, and here we are.

Senator KENNEDY. That is Mother for you.

Mr. KENDALL. Never underestimate the power of a woman.

Senator KENNEDY. Or of Mother.

Mr. KENDALL. Why did Tim and so many thousands like him, choose to ignore the orders of their Government? I repeat, these are not children. These are responsible young citizens deeply concerned with the future of America, anxious to make our world a better place in which to live and bring up their children. They want a world free of war, free of fear, free of poverty. They do not believe it is necessary to kill in order to create peace. They do not believe that it is necessary to first destroy in order to build. And who are we to say that they are wrong?

What have we given these young people? They were brought into a world full of tension, a world in which the threat of total nuclear annihilation is an accepted fact, a world in which white man is pitted against black man, rich against poor, the powerful against the helpless.

They protest, and we ignore them. "They're children," we say to ourselves. "They'll grow up." But maybe they are the ones who are mature. Maybe we ought to grow up.

I would like to read three quotes from Tim's paper:

I have said that I am a pacifist, and that my conscience would convict me of murder if I allowed myself to be drafted. But the Selective Service law provides a loophole for people such as myself. Why did I not take advantage of the law's provision for Conscientious Objectors?

The answer is, in part, that I am a believer in the American principle of the equality of all citizens before the law. If a law is a national law, as the draft law is, then it should apply equally, all over the nation, to all citizens affected by the law. But the fact is that the C.O. provision of the law is not equally accessible to all draft-age men. Selective Conscientious Objectors are examples of people who cannot in conscience allow themselves to be drafted, and yet the C.O. provision is not open to them.

If one is sufficiently well-educated to write a convincing statement—and if he knows enough people who can write convincing statements of recommendation—it will be much easier for him to obtain C.O. status than it will be for one who has never had the opportunity to be educated. It is not enough for one to be sincerely pacifist: one must also be able to prove that he is, to the satisfaction of a group of men who do not agree with him in the first place.

This puts the uneducated—or the under-educated—at quite some disadvantage in this matter. One with a degree in philosophy, for example, will find the task considerably easier than one with only a high school education will find it. A man with no education—or with a very poor education—be he ever so conscientiously opposed to war, may not be able to prove his case verbally at all. It is a general rule that such people have a far smaller chance of winning C.O. status than those with more education.

My conscience will not permit me to take advantage of an unearned privilege which gives me an advantage over my peers who are subject to the draft law. If one is going to remove himself from contributing to war, then he must remove himself in a way that is open to all equally.

I knew that I would never be able to cooperate with the draft. It should be pointed out that, like many other draft-eligible people, I considered very seriously the possibility of leaving the country. I decided against doing so because emigration is a far more permanent thing than prison is, and very simply, there are too many people in this country whom I love. Also, for better or worse, this country is too much a part of me for me ever to want to leave it permanently.

Often I am called foolish, immature, and idealistic. To this charge, all I can say is this: I may well be foolish and immature . . . certainly that is very possible. But, frankly, it seems to me that in this day and age that which men call "idealism" may in reality be mankind's only hope for survival.

Gentlemen, these are not the words of an immature child. These are the thoughts of an anguished young American, who is convinced that we are rushing headlong into self-destruction, both as people and as a nation. He does not want anything for himself. What he wants, and what his friends want, is a better world. A start must be made, and Tim has chosen his way to start. For this, his country is punishing him.

And now, finally, we come to the question of amnesty. What does this country have to gain by offering amnesty to these men? I think the answer is obvious. What do we have to gain by welcoming home thousands of intelligent young people who want nothing more than peace on earth and good will towards all men? What do we have to gain by restoring full rights and privileges as Americans to those that have sacrificed their freedom trying to help others keep theirs? These young men are the potential leaders of their generation. They are capable of good leadership. They do not seek power or wealth. They will work for a better America and a better world.

What do we have to lose by continuing their punishment? I believe we have a great deal to lose. I believe we will lose our own

self-respect and the respect of the world. We have come to look upon ourselves as a great nation, a nation which has opened the doors to the homeless and the oppressed, a nation which has always worked for the freedom of all peoples. Shall we now demonstrate to the world that these goals no longer exist? That we punish our own citizens who work toward these goals in the only way they can?

These men are needed at home. They want to teach—to work among the poor—they want to make America a proud nation again. Do not punish them any further. Do not attach any conditions to forgiveness. Bring them home.

Senator KENNEDY. Thank you very much, Mr. Kendall. Could you tell us a little bit about yourself and your family? I know that you lived in Brookline, Mass. for a number of years.

Mr. KENDALL. Right close to where you lived.

Senator KENNEDY. Field Street?

Mr. KENDALL. Right off of Coolidge Corner.

Senator KENNEDY. Then you moved to Virginia?

Mr. KENDALL. Well, I originally lived in a section of Boston that no longer exists, the Old West End. Then we lived out in Brookline. And when I went down to Connecticut. From there I went on into the Service. It sounds strange now, but I volunteered.

Senator KENNEDY. You were in the service?

Mr. KENDALL. I volunteered in the Second World War.

Senator KENNEDY. So you are a veteran?

Mr. KENDALL. Yes, sir. I was in Germany for a short while. I did not see combat. I was lucky; the war stopped before I got there.

Senator KENNEDY. How old were you when you volunteered?

Mr. KENDALL. Thirty-two.

Senator KENNEDY. So you served in the Army. Then you came back and settled in—

Mr. KENDALL. Yes. I came out of the service in California, stayed there for awhile. Then I went to Louisville, Ky. I worked for the Reynolds Metals people, and they transferred me to Richmond.

I left them after about 17 years and went to work for the U-Haul Co. I am now the president of the U-Haul Co. in Virginia.

Senator KENNEDY. You have 13 children?

Mr. KENDALL. We have 13 children. Tim, of course, is the oldest. We have five boys and eight girls; no problems except money.

Senator KENNEDY. Are any of your other children eligible for the draft?

Mr. KENDALL. Well, no. I think my second oldest son, Dan, has just gotten himself in pretty good shape with his draft number. I do not think he can be called. Jerry is not old enough, and the other two boys are quite small.

Senator KENNEDY. Would you tell us just about your education? Did you complete high school?

Mr. KENDALL. Yes, sir. I went through Dorchester High School for Boys, and I managed to squeeze a couple of years into B.U. at night. That is about as far as I got.

Senator KENNEDY. Certainly your son did not, as I understand, grow up in what would normally be considered a sort of pacifist home?

MR. KENDALL. Oh, no. The closest thing, I believe, we came to pacifism was when I threatened to break the leg of any kid who fought with his brother or sister, but they did this all the time.

Senator KENNEDY. That is a pretty good rule. My father must have talked to you.

MR. KENDALL. I was convinced for many years that I was raising 13 enemies.

Senator KENNEDY. Have you given amnesty to any of them?

MR. KENDALL. We have a couple of them that are gone now. Tim is in prison and Dan is married. My daughter, Susan, has her own apartment. So that gets us down to 10 enemies, and we are kind of cutting them down a little bit.

Senator KENNEDY. How do you respond when you are talking with some of your friends or neighbors and they say, what's with Tim? How come you've got a boy who is in—

MR. KENDALL. Most of them, Senator, do not ask, because I think they believe that I am embarrassed about it, and I do not want to talk about it, which is not so. We have written letters to the editors of the Richmond paper—my wife is a great letterwriter, and she brags about it, actually.

As far as what my neighbors think, I've kind of lost track of my neighbors about 4 years ago, since I live in the South or pretty close to the South, anyway, and we brought in a black student from Africa and he lived in our house for about 4 months. I suddenly discovered I did not have very many friends left. So we do not get much recreation from them, anyway.

But those people that I work with all feel that Tim did the right thing; since this is the way he felt, this is what he should have done.

Senator KENNEDY. How do you feel? You have been a hard-working man all your life, tried to bring up a family, and served in World War II, are a veteran yourself. How do you react to the fact that, you have a boy now who is in jail because he will not do his Service?

MR. KENDALL. Well, at first, my only reaction was that it was a tremendous waste of a lot of years in school and a lot of money. But now I do not feel that way any more. I feel that Tim is as right as anybody can be. I feel now the way he does. I feel the way he does.

I feel particularly about amnesty that there should not be any conditions attached to amnesty. Now, he goes to the other extreme and he says that he is perfectly willing to forgive the Government. But I do not think that amnesty should be withheld from any of them, even from the people that got us into this mess in the first place.

Senator KENNEDY. How do the rest of the children react to this business of their brother's imprisonment?

MR. KENDALL. The real young ones do not really understand. Those that are old enough to understand, I think, are very, very proud of Tim. We are probably going to bankrupt the Federal prisons with the amount of mail that Tim sends out, which he does not have to pay postage on. But there is a constant barrage of mail between

Tim and the children. They love him very much and they fight for the privilege of being the one that goes up to visit when we go up.

The first time we went up to visit Tim, we made a mistake and took about nine of them with us, and we almost got thrown out. They said there was not enough room up there for all of us.

Senator KENNEDY. You mean you take all of your children up to visit Allenwood?

Mr. KENDALL. Yes. He is in Allenwood, Pa., which is about 6 hours away from Richmond.

Senator KENNEDY. Can they all go up to see their brother?

Mr. KENDALL. Oh, yes.

Senator KENNEDY. They can?

Mr. KENDALL. We do not need any special permission for members of the immediate family.

Senator KENNEDY. How often do you go?

Mr. KENDALL. We go about once a month, every 3 weeks or a month. It is kind of a rough trip. We usually leave at about 2 o'clock in the morning and get there at 8, stay until 1, and drive back home.

Senator KENNEDY. What can you tell us about the sense of loss of the members of the family, either missing a brother or—

Mr. KENDALL. Truthfully, Senator, I do not think that anybody feels that we have suffered a loss, really. I mean, we are in touch with Tim and we know he is all right and we know he has done what he wanted to do, and we know that he has done what he thinks is right and what we think is right. We all love him and he loves us, and this has always been this way. I do not think that we feel that we have lost anything.

I know that there are a lot of people, probably, who feel sorry for us about it, but we do not feel that way.

I am glad that Judge Merhige reduced his sentence to 2 years. He will be out, probably, in less than a year. And I presume that what he is going to do then is either go back to Notre Dame and continue his studies leading to his doctorate, or he may now go to work in the ghetto some place, or some community house somewhere, helping kids. He would rather help kids than do anything else. Tim is that way.

Senator KENNEDY. Why do you think he went to jail rather than into exile?

Mr. KENDALL. Well, in his paper—his paper, Senator, was almost 2 hours long. It was a long thing. I was surprised that the judge even let him read it all. But he goes into great detail on this, and he said that he felt that if he were going to practice civil disobedience, then he ought to be willing to take the consequences and simply go to prison. I think now maybe he feels a little differently. I think maybe he feels that those who left the country, actually did more than he did, because what they gave up they gave up permanently unless the country lets them back in, where Tim will be out. He will have paid his penalty and he will be out.

Of course, he will not have his rights and privileges restored, but he will not be in prison and nobody will be trying to put him in, either.

Senator KENNEDY. What do you mean by the "rights and privileges?"

Mr. KENDALL. Well, I mean, it is my understanding that he has lost his right to vote, and I do not know any of the others, really. This is the big one. This really bothers him.

Senator KENNEDY. It is a pretty basic one, is it not, pretty important?

Mr. KENDALL. This is the one that bothers him more than anything else.

Senator KENNEDY. That will certainly be restored, would it not, if any kind of amnesty were granted?

Mr. KENDALL. Yes, under amnesty.

Senator KENNEDY. Thank you very much, Mr. Kendall. You are good to come here and share this personal experience with us.

Mr. KENDALL. Thank you, sir.

Senator KENNEDY. You have done a very important service.

[Applause.]

Senator KENNEDY. I am pleased to welcome Rev. Alexander Wilson, pastor of the Westminster United Presbyterian Church. He has three sons, one of whom is a conscientious objector or, as he says, a deserter, from the U.S. Army.

STATEMENT OF REV. ALEXANDER C. WILSON, PASTOR, WESTMINISTER UNITED PRESBYTERIAN CHURCH, BURGETTSTOWN, PA.

Reverend WILSON. Mr. Chairman, may I first express my thanks for the privilege of listening to this testimony today. It has been a most significant experience.

I would like to say that my heart goes out to Mr. Kelley who spoke earlier this morning. I think he speaks to us most eloquently that the tragedy and the bitterness continue long after the killing stops. The tragedy of war is not just young men killed and maimed, not just young men mentally or spiritually destroyed. The tragedy extends throughout our Nation, as we have very poignant testimony of the extent and the depth of that tragedy—warping, twisting, and the ultimate sadness.

I heard his words and I understood them, but I also heard the cry of his heart, and it was a cry for healing, for repair. To me, it was the most—though unintentionally—it was the most convincing argument for amnesty that I have ever heard.

I speak today as the father of a conscientious deserter from the U.S. Army. For some time I had great difficulty in saying those words, because I served in that Army in World War II, as a volunteer, for 3½ years, and "deserter" was the dirtiest word I knew.

I learned a new definition from my son. Of course, I love him, and of course, that makes me prejudiced, but it doesn't necessarily make me wrong. As I listened to him, and reasoned with him for a solid month before he left, he made sense, and I was proud of him. Not because he was right—I wasn't sure of that yet—but because he was doing what he felt was right, and for that any father can be proud. And any Nation can be proud of its young men when they

do what is right by their own conscience. This is what he was taught in his home, in his school, in his church.

A previous speaker today said we must obey the law. There is only one law we must obey: the law of God or the law of conscience written in our own hearts.

Why should we have amnesty for war resisters, draft evaders, and deserters? For the men in Canada, not because they are asking for it, for they are not. Not because they want to come home, for most of them went well aware of the consequences and expecting to stay and make their homes in Canada.

There are better reasons for amnesty, reasons which are in our national interest:

1. Because we need all the good men we can get, and these are good men. Not many are cowards. Anyone who knew the courage it takes to leave family and friends, and security, and begin a new life in a new country knows these men are not cowards. They are extremely conscientious. They are sensitive to human need. They are highly idealistic. They have keen minds, good education, useful skills. A Canadian pastor said to me, "This is the finest wave of immigration Canada has ever received." If that is true, they are a correspondingly great loss to us, a loss that is not in our national interest.

2. Because they have influenced the thinking of our Nation. Today, virtually all of us see the war as a tragic mistake. But we did not always see it that way. These men were objecting, and paying the price of objecting, when I—and many of us—still felt the war was right and proper. At great cost to themselves, they have been a major factor in changing the thinking of our Nation on this war.

3. Because they were right on the issue. Sixty thousand young men who were able to see clearly on a crucial issue, and acted on their convictions, when most of the Nation did not see so clearly, or was unwilling to act, may give us insights in the future which will keep us out of another tragedy. They were right on this war. They may help us avoid another.

4. There is a humanitarian reason. A few, a small percentage, are not going to make it to Canada. They do not have the skills or education to become landed immigrants. They cannot work in Canada; they have no future there. There are a few others without strong enough personalities to survive so far from home and family. And there are some who have had situations develop in their families for which they are needed at home. This small number needs to return home. If we can release Jimmy Hoffa on the grounds of human compassion, can we not let these young men return, whose offenses are in no way comparable to Hoffa's?

5. There is a reason based on fairness. We have treated people differently as our national attitude on the war have changed. My own son always refused to apply for Conscientious Objector status because, as he understood it and as the draft boards applied the rules at that time, he was not one. His objection was to this particular war, or so he thought. His reasons—the reasons he gave for not seeking conscientious objector status were: he would have fought in World War II; he would be willing to use violent means to protect

his family against violence; he personally had a quick temper. Today, Selective Service has advised the draft boards that none of these are reasons to deny a man the legal status of a conscientious objector. But a few years ago, at the time my son was drafted, that was not so. He was forced, by the practices in effect at the time, to either leave the country or go to prison if he would not participate in the killing. Today, the same boy, with the same reasons, would be given conscientious objector status.

We have lost to Canada about as many men as we have lost, killed in Vietnam. If we let that loss to Canada become permanent, we would actually double the number of men our Nation and its families will have lost in this war. Such a doubling of losses cannot be in our national interest.

I would just like to add that Mr. Kerns referred to the low morale of our Army and blamed this in part on the hearings on amnesty. Amnesty did not destroy the morale of our Army; the war in Vietnam destroyed it. I should personally be delighted to allow Vietnam veterans to decide about amnesty. They are more in favor of it than the American public is.

I would be quite willing to trust the decision about the men in Canada to the prisoners of war. I just wish we could put the decision about the prisoners of war in the hands of the men in Canada, for then they would be home by now.

Thank you.

Senator KENNEDY. Reverend, I have some questions—that is a bell for a vote. We shall recess for 6 or 7 minutes. Then we have some questions for you, and then we will have a panel and adjourn. (Short recess.)

Senator KENNEDY. The subcommittee will come to order.

Again I apologize for interrupting you. I know it is difficult to maintain continuity of thought when we get interruptions like that.

I would be interested, Reverend, in the reaction of your community. You are a minister of the Presbyterian faith, as I understand it. I would be interested in the reaction of your community to you and your family situation, how you have been able to cope with it, what the impact has been on your other children.

Reverend WILSON. It was an interesting reaction. We were aware that it might be quite adverse. We were aware that it might mean that we would leave our church and move to another.

Much to our surprise, I do not believe I have heard in our town a word of criticism yet. I am sure there is something said; I am not deceiving myself on that. But none of it comes to my ears at all. As far as I know, no one stopped coming to church, no one has said an unkind word.

I was simply amazed at the breadth and the depth of the understanding that existed, and I am from a small Western Pennsylvania coal-mining town. Men whom I had put down as military types, who are members of the American Legion and the VFW, came to me and said, if I had to do it, I would do what your son did.

Senator KENNEDY. How have your children reacted, your other children, to this?

Reverend WILSON. It has not affected them very much. They were both away in college at the time. It appears that neither one of them has to face the draft; they have high enough lottery numbers. I think that they might do the same thing if they did. They simply have not had to face a decision about it yet.

Senator KENNEDY. What is generally your attitude on this question of amnesty? I know you have given a great deal of thought to the particular problem that your son is facing. What do you think the Government ought to be doing about it?

Reverend WILSON. Well, I am definitely in favor of an unconditional amnesty. I think amnesty, with conditions would be utterly meaningless. It is practically a joke to the men in Canada. They do not even want to talk about that.

I have read a statement that is to be presented here by a group from Canada, and it represents my son's thinking very well.

Senator KENNEDY. Very good. Thank you very much, Reverend. I appreciate very much your appearance here.

Our final witnesses today are two men who have been exiled in Canada: one, Mike Hendricks; the other Tim Maloney. They are working in centers in Canada where they work with other young men in similar circumstances. Both also can be here legally today because their position as to draft vulnerability has been changed.

Tim Maloney was reclassified, apparently punitively, and ordered to take a preinduction physical exam. He refused to report, and an indictment was returned. Mr. Maloney went to Canada in September 1968.

In October 1969, the Supreme Court handed down a decision in the *Gutknecht* case, holding punitive reclassifications illegal. Some 6 months later, the indictment against Mr. Maloney was dropped. He was reclassified 1-A, and his name was placed in the first lottery. He turned up No. 361.

Mike Hendricks made a decision to leave while classified 1-A in 1968. He subsequently also received a high number and currently resides in Montreal.

You are welcome, gentlemen.

Mr. Hendricks, would you like to go first?

STATEMENTS OF TIMOTHY J. MALONEY, WINNIPEG, AND MIKE HENDRICKS, MONTREAL

Mr. HENDRICKS. I am going to yield to Mr. Maloney.

Mr. MALONEY. I am very glad to be here, Senator. I regret, though, that people like Mr. Kendall's son, who is in prison and Reverend Wilson's son, who is in exile, cannot also be here to testify, because their testimony would be very worth while.

I also regret that some of my friends in the exile community in Canada cannot be here today.

The last time I arrived in Washington, D.C., I was proud to be a U.S. citizen and anxious to serve my country. It was 1964 and I was accepting an appointment with the Federal Bureau of Investigation as a file clerk in the Justice Building. Five years later, in February of 1969, I discarded a Presidential order that instructed me to re-

port for induction into the U.S. Army. At that time my wife and I were living in Canada where I was assisting war objectors as a social worker and attending graduate school.

Today I am again in Washington, D.C., not proud this time of being a U.S. citizen but willing to give you my views on the amnesty issue that has been raised by you and your colleagues. In doing so, I pray that you, who are leaders in this country, may see a way of reconciling the tragic wrongs that have alienated thousands of people like myself and have created grievous differences within the country that have torn asunder the American dream.

While many tragic wrongs have been committed and are being perpetuated, they all have one common denominator—the Indochinese war. Before any substantive reconciliation of the many wrongs can occur, there has to be a genuine U.S. commitment to ending the war. Yet, the issue of granting an amnesty to some of the victims of the war has been raised and it would be ludicrous not to discuss it at this time. If discussion does no more than kill the inept bills of Senator Taft and Representative Koch, it will have been worth while. Though, to stop there without constructively dealing with the issue only fosters more frustration that has been so characteristic of the entire Vietnam-Indochinese experience.

Newsweek's recent Gallup Poll disclosed that 71 percent of the people interviewed favored some form of amnesty. To ignore that, to be unresponsive to the will of the people, or to consider solutions such as Representative Hébert's "I would send them out on a ship like a man without a country" is characteristic of much Government policy and attitude, but hopefully a change is in sight for the seventies.

If there is a sincere commitment on the part of Government to deal realistically with developing an amnesty proposal that will be beneficial for the Nation and the victims; that is, some of the 354,000 soldiers classified as deserters since 1967 and the thousands of draft evaders, the Government will have to have a thorough understanding of the phenomenon. To date, most elected representatives have illustrated through their statements and bills that they have an appalling ignorance of the phenomenon and the possible encompassing, constructive solutions.

In Canada, the exile community has viewed the development and discussion of the amnesty issue in the United States with deep concern. There is a wide consensus, as was illustrated at a national press conference in Toronto on January 17, 1972, that the word "amnesty" itself is inherently problematic. It implies forgiveness, and the exile community wonders what they are to be forgiven for—they did not commit the crime. They refused to.

There is also concern that the present intensity of discussion over amnesty in the United States will end after the Presidential election. The exiles see themselves being used as pawns in a political game. They see the issue being used by some politicians in an attempt to relieve American war guilt, to buy the votes of the newly enfranchised youth, to give the false impression that the war is winding down, *et cetera*.

They see the American news media portraying the exile community as being composed of sad, lonely, ill-begotten, misguided youth who made a mistake and are crying at the border to return; and that, the United States, being all-powerful and forgiving, is now in a position to show its paternal concern for its erring sons. They resent the fact that some people may be using them for personal gain and that others are definitely presenting an erroneous portrayal of them.

Senator KENNEDY. Let me interrupt and perhaps clear up one impression. That is the political capital that can be made on this. If you have the time and you want to come over and look at my mail count anytime, you are more than welcome to do it. But I think just in terms of the issue itself, as you can well understand, I am sure, it is an enormous emotional kind of question. I am not familiar with your Gallup Poll about 71 percent of the people interviewed favoring some form of amnesty. Perhaps you have it there; I shall get a look at it.

I do not know how Senator Taft's mail is running, but I would say mine is running about 20 to 1 against granting it at this time. So, just to put to rest any kind of potential gain that can arise from it at this time, I make this point.

Mr. MALONEY. That might be true. I am reflecting some of the concerns of the exile community. They see this happening.

Senator KENNEDY. That is fair enough. Good.

Mr. MALONEY. And they fear that in the process of being used they may be hurt, that is, that one of the current amnesty proposals might be passed. Both Senator Taft's and Representative Koch's proposals attach a punitive string called "alternative service" as you well know. Plus, both proposals exclude deserters, who comprise the majority of the exile community in Canada. I have not yet met a war objector in Canada who accepts either of the proposals, nor do I or anyone else I have spoken with see justice in them.

What the exile community would like is a totally complete nonpunitive restoration of their civil liberties. This sort of concept would turn the amnesty issue right-side-up by removing the indignity of having to accept forgiveness and punitive service. Also, it would apply to everyone and allow each individual maximum freedom in deciding upon whether to stay in Canada or return to the country which had no room for him.

Since the majority of men in exile and prison are deserters, any substantive "amnesty proposal" must incorporate provisions that will enable them to easily regain their civil liberties. None of the current proposals or suggested proposals to date allow for this. Suggesting that each deserter be judged individually is ludicrous, if not mechanically impractical, due to the sheer numbers involved. Surely the 1947 Truman amnesty illustrates the injustices of establishing criteria and attempting to judge thousands of men individually. Yet, there appears to be a gross misconception that operates on the premise that deserters have less morality and that their motives are less genuine and thus more suspect than the motives of their civilian peers.

While a draft-evader may have had a premature morality due to more education and social class benefits, the deserter's decision to leave the military and the United States is often a more difficult individual decision. His reasons for leaving, may, in fact, be based on a greater struggle with his conscience. His actual decision to leave is difficult as he cannot reflect upon his future from a relative position of ease and he is in a hostile environment where he can obtain very little support. His military experience, contact with returning veterans, and concurrent mental agony is often his only education, but an extremely valid one that helps him decide upon his future. When he makes his decision to leave, based on such a gut level education, I can only respect, not question, his motives.

Thank you.

Senator KENNEDY. I have that poll that you mentioned here, the Newsweek poll. As I understand, the participants when the poll were first asked, "Do you favor the proposed amnesty for Americans who left the country or those who have gone to jail," and so on. Fifty-eight percent opposed, 38 percent favor, and 4 percent have no opinion.

Mr. MALONEY. Excuse me. That was one of the first questions they asked.

Senator KENNEDY. All right. Then, when they were asked a choice of about five questions—favor amnesty without qualification, that is 7 percent; favor amnesty with service requirement along the lines of the Taft-Koch bill—that is 63 percent; favor amnesty—uncertain, 1 percent; favor amnesty without qualification, opposed to, don't know, 7.

So this poll does, at least, reflect some of the problems that are concerning a great number of American people in coping with this issue, quite frankly.

Mr. MALONEY. Most certainly. I thought it was interesting in that Gallup Poll, even though it covers only a small number of people in the interview, that a sizeable proportion of the majority certainly favored some form of amnesty. And I think that with some public education—

Senator KENNEDY. I think our history reflects a willingness to cope with this problem. Obviously, now, I think it is highly unlikely that the country can move into it immediately. But I think it is the purpose of our hearings that people can gain an understanding of the views of some of the people we have heard today, which I think has been enormously important and very, very helpful and useful to us.

Let us hear from Mr. Hendricks.

Mr. HENDRICKS. Senator, I bring a statement that is composed by our group in Montreal. It is a group effort.

Amnesty is not the vital issue of our exile. We went into exile because of a war we then thought, and continue to think, immoral and illegal, and that war still goes on. Our exile will also go on, at least until the American war in Indochina finally and totally ends. Amnesty is a postwar issue still awaiting a postwar era.

We must first emphasize that we are here today not because we have chosen to make our return to the United States a topic of public discussion. However, it is an issue without our urging, and it is

an issue that involves our lives. We feel it is necessary to have our say.

The refugee movement to Canada and Europe these past 8 war years has been primarily a human response to the inhuman destruction of Indochina and to a society that has allowed such destruction to go on. Men and women of our generation, brought up believing in the United States as the defender of freedom, could see no connection between that heritage and the realities of fire and death unleashed on innocent peoples in Indochina.

Nor has this war limited itself to destroying societies in Indochina. It has also very nearly destroyed the society of the United States. The American dream we were all weaned on was exploded over Hanoi in 1967 and continues to explode daily all over Indochina. Those of us who chose exile were adamantly refusing to lend our bodies and souls to such inhumane acts of our countrymen. Yet we were also declining to accept punishment in prison for positions regarding the war that the Pentagon Papers have now substantiated, and to which the Gallup Polls indicate the majority of the country now subscribes.

Jules Feiffer called it "premature morality"—why should we be considered criminals for thinking then what everyone thinks now?

Amnesty. The definition is "forgiveness" or "forgetfulness." We cannot accept such a term: we cannot be forgiven for taking morally correct stands against immoral acts of our Government. And we do not intend to forget, nor should this country forget, what forced us into our exile.

We have no need of either forgiveness or forgetfulness. What we would seek—when the war in Indochina ends—is a totally nonpunitive restoration of our civil liberties. That is, the right to return to our home Nation without prosecution or recrimination. We feel that a withdrawal of civil or military charges for offenses due to actions relating directly or indirectly to the Indochinese war should be extended to all those in prisons, underground, or abroad.

That is what we would seek. The present legislation before the Senate—proposed by Senator Taft—is not at all what everyone honestly interested in the reconciliation of this Nation would seek. It is designed to pacify the American people, to rid them of their guilt for this brutal war, and to wash Indochina from the American conscience.

We are all aware of the features of Senator Taft's bill. It is punitive in requiring alternate service as the condition for our return and, worse, it discriminates in favor of draft-dodgers over deserters.

Deserters and draft-dodgers have been united throughout our exile in opposition to the Indochinese war. We see no difference whatsoever among us. However, people at home insist on viewing draft-dodgers as middle-class, well-educated persons, and deserters as working-class, less-educated persons.

While this is statistically correct, its validity is distorted when social and economic class distinctions are related to levels of morality. Being born into a working-class home in no way disqualifies a man or woman from being morally repelled by the inhumanity of this war.

In truth, deserters as well as draft-dodgers left because of opposition to the war and because of the malaise of a society that could create such a war.

The only real difference, then, between draft-dodgers and deserters is a matter of when they became aware of their moral opposition and their inability to participate in such a war. A matter of timing. What possible rationale could there be for legislation that reduces a grave matter of morality and conscience to a mere matter of timing?

Senator Taft's proposed bill is clearly not a judicious or a well-intended solution to the unprecedented situation of mass numbers of refugees from America. A more reasonable approach would have to deal equally with all refugees regardless of their status at birth or their father's income.

There is no escaping the fact that the American poor—rural and urban—have been forced to carry the worse burdens of the American war in Indochina. And it would be only perpetuating this cruelty to pass one more bill that discriminated against this class of citizens.

Whatever formula is finally accepted as a means of determining whether a deserter in fact deserted because of moral objections, let that formula apply equally to all refugees. For we would not want to be split from our brothers and sisters by an arbitrary decision made in the American Congress.

Allow us to conclude by stating one more time that the continuing war against the Indochinese peoples is immoral. It is now the responsibility of the American people to brand this war as immoral, and to deal with the destruction it has wrought not only in Indochina but also here in America. Thereafter, it would be patently dishonest to continue prosecuting those Americans who knew this painful reality years ago.

Senator KENNEDY. Thank you very much, Mr. Hendricks. I can tell that a great deal of thought went into both of these comments and statements, and we appreciate very much having them.

Let me see if I have the position of your group. If we were to consider the most likely prospects for amnesty now, I would think that the strongest possibility is that there will be Taft-like legislation, a conditional amnesty, while the war is winding down further.

I am satisfied that you are certainly not going to get unconditional amnesty, and it is probably unlikely that you would get conditional. But I would think that that would be the best opportunity to get anything at all.

As I understand, as far as the people that you are in contact with, that would really be meaningless, is that correct?

Mr. HENDRICKS. Yes, sir.

Senator KENNEDY. Certainly, at the end of the war, or the return of the prisoners of war, or at the ending of the draft—perhaps then you could consider unconditional amnesty. I think it is unrealistic to think that you are either going to get administrative action or legislative action on unconditional amnesty until the end of hostilities or the return of the prisoners of war.

I think it is very, very unlikely. Am I right, that what you want is not the granting of amnesty, it is the withdrawal of the charges

that have been placed against these young people? Do I state correctly what I gather from your testimony?

Mr. HENDRICKS. More or less, Senator. What we are seeking is not, as I said, forgiveness. I do not know the word in English; I do not think there is one for what we want, a single phrase. Perhaps we could just say the recognition of the realities, the war bill—who knows what to call it?

Senator KENNEDY. I am just trying to think of the specific provisions of an amnesty proposal. As I gather, your position is that amnesty would suggest that you are being forgiven for something that you do not feel any kind of guilt about.

Mr. HENDRICKS. Not a bit.

Senator KENNEDY. So, really, as I understand, your position is that you are not as interested in amnesty as the elimination of the charges and the allegations against the young people.

Mr. MALONEY. Basically.

Mr. HENDRICKS. I would say, Senator, that the first thing we are interested in and that we really came for is the end to the war, because without the Vietnamese free we cannot be free. But beyond that, the word as used today by the opposition, "expungement." What possible good can we do for young Kendall if we do not expunge the record and get his right to vote?

That is expungement. You can call it anything you want, but we want everything just set back to status quo ante, because after all, the war was immoral, it was illegal.

Mr. MALONEY. If I might comment, just on two points.

Senator KENNEDY. Yes.

Mr. MALONEY. No. 1, amnesty, if we are stuck with that word, I think has to be inclusive. It has to include all of the victims of the war. It has to include the 500,000 men who have less-than-honorable discharges. It has to somehow deal with the men in stockades.

Senator KENNEDY. Would you include those that have been involved in other acts or committed other crimes?

Mr. MALONEY. Yes; I think there has to be——

Senator KENNEDY. The guy in Senator Hart's example, the fellow who has taken the money from the company commander's till or stole some jeeps or been involved in crimes of violence in Germany and went to Scandinavia?

Mr. MALONEY. I think there has to be a way, Senator, of dealing with that individual, a person who has destroyed property or injured people. I think if we look into the record, we will see that——

Senator KENNEDY. Cannot you separate those? Do you see a problem in separating those?

Mr. MALONEY. I see a problem legalistically in terms of how a bill might be drafted.

Senator KENNEDY. Pardon?

Mr. MALONEY. I see a legal problem in how a bill might be drafted. I would think that it would be very difficult to sell a universal amnesty that would say, let us open up the stockades, let us forget those things.

Senator KENNEDY. Do not put yourself in our position, which is trying to decide what is going to be in the legislation. I am inter-

ested in whether you drew a distinction between those that have been involved in either leaving the country or serving in prison because of opposition to the war, versus those that are exiled because of some other crime.

You know, we have to wrestle around and see how that distinction can be drawn, but if we can draw that distinction, do you think that distinction should be drawn?

Mr. MALONEY. If you mean, should they be included in some kind of amnesty proposal; yes. It is a very fine line. A person who stole the money from petty cash in the commanding officer's office—certainly, if he needed that cash to get to Canada and he had some strong feelings about conscience in a war, I think that has to be looked at in that light.

Likewise, the man——

Senator KENNEDY. What if he beat up an old woman and stole her bag, kicked her in the teeth, and is over there in Canada?

Mr. HENDRICKS. That is not an offense involving his military record.

Senator KENNEDY. That is what I wanted to know.

Mr. HENDRICKS. I know you are not a hostile questioner.

Senator, the most important aspect of it is that it be a bill to compensate the wrongs for all the victims. And, you know, we are the least important, really, although maybe the most numerous in some ways. Because the vets have suffered such hideous things. There could be amnesty. All the guys that got less than "honorable" are in some way marked and they would not even have been in that Army if it had not been for this immoral war.

How can that be rectified? God only knows.

Mr. MALONEY. That is why, in the light of this whole amnesty discussion, I think a conditional amnesty, if it were possible this year to get some bill through that had a conditional amnesty, I think it would be harmful, not helpful. I think it could preempt—

Senator KENNEDY. Well, that is helpful to hear. I am interested in your views.

Mr. HENDRICKS. One thing more, Senator. You must be aware that the stockades are full of men but they are not there for knocking over the till or beating up old ladies; they are there for some things that, if you had done them in civilian life, might have got you fired from the job or not even that, just lose a day's wages. These guys' lives are marked.

Senator KENNEDY. Could you tell us a little bit about the life of the exile in Canada?

Mr. HENDRICKS. It is a varied experience. There are all kinds. The one thing that's for sure—there is a little joy in it, you know. We are not all sitting up there grieving and starving. There are problems; yes. The majority are employed and they are doing quite well in their new lives.

The one thing most interesting about it is that when we crossed that border, we made a big political decision and a social decision. We shook off Mom, we shook off the problems from home, status problems, career fantasies, all those things, and we had to start all over again.

We had nothing. We have started in different ways. We are a bigger melting pot there than we would have ever been at home because our channels are different and we mix and meet Americans that we would never know back at home. It is a wonderful experience.

Among the deserter community, there is a high proportion of Southerners who, although we have read testimony as to their loyalty, and who are still very, very fond of their country, have gotten fed up with getting the short end of the stick. These boys—men and women, really—are the products of very poor educations, quite often, and bring not a whole lot with them.

So Canada for them is a tremendous liberation. They get free schools, they get free education programs where they are paid to go to school. A lot of things—

Senator KENNEDY. Free health care.

Mr. HENDRICKS. Free health care, of course. We know how you feel about that.

We can charge our medical care. There are a lot of good aspects. The only thing, of course, is that it is not home.

Mr. MALONEY. I think that the majority would like to be able to return to visit. I think this is one question that has continually come up; that is, if unconditional or any other kind of amnesty were granted, what percentage would return? I think it is a rather mute question, because I think they have the right to return or they should be granted the right to make that decision, but the fact is if we wanted to get statistical, many would like to come back and visit, but many of them at this point and time are very well established, in Canada, have jobs, are raising families, have married Canadians, are in all sorts of walks of life.

For the most part, they are doing quite well. Yet, we have another category of men in Canada who are having extreme problems, and these are the ones who perhaps have less education, have some emotional problems, have a lot of difficulty making the break, going across that border. They left a lot behind and they have trouble living with that decision, and they have trouble coping with their new life in Canada. Some of these have already, the AID groups in Canada—we are in the process, for example, of helping men return. Each month we help some men return. Some return on their own. But this is a small minority.

Yet this is the group of men who are going to need the unconditional amnesty, because they are certainly not the more vocal, educated men who can speak from deep feelings of conscience in terms of their feelings. These are the men that, usually, our legislation never reaches.

We try to help people and we generally end up helping those people who—we never reach those who need the help most. I hope this does not happen in this circumstance.

Senator KENNEDY. What is the attitude of the Canadians toward you?

Mr. HENDRICKS. Mixed. On the surface, there is growing hostility, especially in Quebec. But they will say, "I don't like Americans, but yet we are with you on this issue." Quebecois, of course, have always

fought the draft, so they feel that, ideologically, we are in the same ball park.

In fact, they are very warm and they have been most decent. Almost everyone was helped greatly by some Canadian family when they arrived, either financially or just emotionally.

SENATOR KENNEDY. Just, finally, I shall ask each one of you the question: Would each one of you do it again if you knew then what you know now?

MR. MALONEY. Yes; I would. It is a very simple answer, but it was a very difficult decision. I am one of those, who I referred to in my paper as one of the more elitist-type—the draft-evader, the person with the education who, for \$2 could buy a manual that told him step-by-step how to do it. But I think that surely—it is even indicated in my presentation that at one point, I was working for the FBI and 5 years later, I refused an induction order—a lot of change occurred in that 5 years.

That kind of change was seeing the war emerge and having a wife and not wanting to leave her, feeling very strongly against conscription.

Then the most difficult decision, being an only child, leaving parents and really hurting both of them and going to Canada, knowing that I would never be able to return again.

Then, all of a sudden, the cards were changed due to a technicality and I can come back here and live. Yet, I intend to stay in Canada. I intend to live there. I am making my home there.

I would say I would do it again, but it would be no easier the second time, no easier at all.

MR. HENDRICKS. For me, I was very interested today when Mr. Kendall said that his son admires the exiles because we have taken a life term. Yet lately, I have thought, you know, that the guys in prison are the ones who really did it. At the time I went, I said, no prison.

Still, I do not think I could take prison. I could not stomach it, I think. It takes so much strength. But, really, they are the ones we have to look up to and admire, because it is awfully, awfully hard. They are paying the supreme price.

Definitely, if the situation were the same as it was in 1968, I would go to Canada. Today, I do not know. I really do not know. But I am going to stick it out until the end. I would not think of coming back until there is not another American in Southeast Asia, and that may be a long time.

But I feel wedded to the Indochinese.

SENATOR KENNEDY. Thank you very much, gentlemen. You have made very helpful comments.

Mr. and Mrs. Ransom, who could not make it today, will be our lead-off witnesses tomorrow.

The subcommittee will stand in recess until 10 a.m. tomorrow morning.

(Whereupon, at 3:55 p.m., the hearing adjourned, to reconvene at 10 a.m., on Wednesday, March 1, 1972.)

SELECTIVE SERVICE PROCEDURES AND ADMINISTRATIVE POSSIBILITIES FOR AMNESTY

WEDNESDAY, MARCH 1, 1972

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 4232, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding), Hart, and Mathias.

Also present: James Flug, chief counsel; Thomas Susman, assistant counsel; and Mark Schneider.

Senator KENNEDY. The Senate Subcommittee on Administrative Practice and Procedure will continue its hearings today into the procedures of the Selective Service System and into the administrative possibilities for amnesty.

We have had 2 days of testimony thus far, the first day concentrating on the current operations of the Selective Service System in which a host of errors and questionable practices have occurred, despite the general progress that has been achieved since our hearings 2 years ago. It is clear that perhaps many thousands of past registrants have been classified or inducted—or ordered for induction—as a result of errors and omissions of local boards.

And yesterday, we heard from nine witnesses who expressed nearly every possible view on the subject of amnesty, some with passion, all with deep personal feelings on the matter, and their comments illuminated the difficult problems presented by this issue.

Their testimony also provided clues to discover where the national interest may lie on this subject.

Henry Steele Commager, the eminent historian, brought us a new understanding of the U.S. experience with amnesty following other wars. He quoted Washington, who first established the precedent of generosity. Washington said, "Though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet my personal feeling is to mingle in the operations of the Government every degree of moderation and tenderness which justice, dignity and safety may permit."

Dr. Commager then traced the history of amnesty through the Civil War where the policy of reconciliation won out over the policy of recriminations.

And he concluded by emphasizing that the decision of the Government on the question of amnesty must not be made on the basis of passion but on the basis of what is in the national interest.

We also heard from Martin Kelley, a Gold Star Father, who forcefully objected to amnesty under any conditions as a slight to those who have fought and died in Vietnam.

The response to that position came from Mrs. Valerie Kushner, whose husband remains a prisoner in North Vietnam. Eloquently pleading for compassion for exiles and convicted objectors to the war, she quoted Ecclesiastes: "To everything there is a season, and a time to every purpose under the heaven: . . . a time to kill, and a time to heal; a time to break down, and a time to build up;" and said, "We have had our time of killing and now we must prepare ourselves for the time of healing. We cannot expect to make whole the Body America if we amputate from her flesh so many of her sons."

We also heard from the veterans themselves. James Kerns, who served in the U.S. Army Special Forces, advocated no discussion today of the question of amnesty, and he was answered by Bronze Star Winner Everett Brown Carson. The former Marine Corps first lieutenant disagreed, saying, "If there is any good to come from this tragic episode, it is that we may have the humility to admit that we were wrong, as we have partially already done, and to welcome those men who dared to say with their lives what we often-times even fear to speak: No more war. I will not kill my fellow man."

David Harris, who served in prison and the young men who had chosen exile in Canada also argued for amnesty although they emphasized, as did virtually all who testified, that the first act of amnesty must be an end to the war.

There also was the father of a young man serving a prison sentence and the father of the young man who had deserted from the Army because of his conscientious objections to the Vietnam War.

Sam Kendall of Virginia noted that his son, who could have qualified for a conscientious objector classification refused to apply for that classification because he felt that other young men, less articulate but no less opposed to the war, could not obtain a similar classification.

For those in prison and those in Canada he asked: "What do we have to lose by continuing their punishment? I believe we have a great deal to lose. We have come to look upon ourselves as a great nation, a nation which has opened the doors to the homeless and the oppressed—shall we now demonstrate to the world—that we punish our own citizens who work toward these goals in their own way?"

But finally, the Reverend Alexander Wilson, whose son now is in exile in Canada, said that he believed that if the question of amnesty for draft evaders and deserters were left to the Vietnam war veterans themselves, that amnesty would be granted. And he added that not only would he be willing to do that; but, if the question of amnesty were left to the prisoners of war and the question of the prisoners of war were left to those in exile, he believed the exiles would be freed to return and the prisoners of war would be freed to return because those in exile would demand an end to the war immediately.

We have not settled the issue one way or the other. There is no preponderance of evidence or preponderance of logic that points irretrievably in either direction.

We are left to struggle with our own conscience, to examine the competing interests and values and to try to arrive at a conclusion that is in the national interest.

Today, we shall try to examine some of the implications for society, and for the institutions of this nation, for the system of law, for the military, and for the moral code of the nation of a decision to grant amnesty.

For above all else, we must make our decision based less on our personal prejudices and beliefs than on what will be in the interests of a nation that must find some way to bind up the wounds caused by this war.

We've been going late in the afternoon the past days. We have a long schedule with many witnesses and other responsibilities so we've tried to keep it moving along as much as possible, especially when we have votes on the floor. We are in a difficult position right now in having three witnesses, all we have assured could go first.

Mr. and Mrs. Robert Ransom, the Gold Star Parents from New York who were supposed to testify yesterday could not because of Mr. Ransom's illness. They have been able to come down from New York this morning and we want to get them right on because they have to get back and, in addition, Mr. John Geiger, the National Commander of the American Legion has been kind enough to arrange his schedule to be with us this morning and he has other obligations, so we'd like to get him on right away.

Why don't all three of you come forward and we will take you all first. We'll hear from Commander Geiger and then the Ransoms, and then we will just have some questions.

First Mr. Geiger, the National Commander of the American Legion, currently employed by United Air Lines. He served in World War II and represents 2.7 million veterans who are members of the American Legion. He has other business this morning and he has a statement and we would be glad to include the statement—we're glad to have your statement in its entirety. Whichever way you would like to proceed—we can include your whole statement or read from it or whatever you'd like to do.

STATEMENT OF JOHN H. GEIGER, NATIONAL COMMANDER, AMERICAN LEGION: ACCOMPANIED BY EMMETT LENIHAN, CHAIRMAN, NATIONAL SECURITY COMMISSION, THE AMERICAN LEGION AND HERALD STRINGER, DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION

Mr. GEIGER. First I'd like to have the opportunity to introduce the two gentlemen who are accompanying me here. On my right is Mr. Emmett Lanihan, of the State of Washington, who is chairman of the National Security Commission of the American Legion; on my left is Mr. Herald Stringer, director of the Legislative Commission of the American Legion with whom I'm sure you're familiar.

We have here a few Legionnaires who have accompanied me this morning representing the departments or States of the Senators on this subcommittee. We have in the city over 1,600 Legionnaires in attendance at our annual Washington conference. They are actively engaged in the work of the Legion at the Sheraton Park Hotel.

Mr. Chairman, and members of the subcommittee, I am appearing here today at your invitation to present the views of the American Legion on the question of executive clemency for those who have failed to comply with the statutory and regulatory requirements of the Selective Service Act and those who have deserted from military service during the Vietnam war.

You and the members of the subcommittee are to be commended for your efforts to develop information on this complex subject. As national commander, I am pleased that so many members of the subcommittee are veterans and members of the American Legion and are aware of our interest in defense and military matters. For the record, our current membership exceeds 2,700,000 honorably discharged former servicemen and women of World War I, World War II, Korea and Vietnam.

With the exception of World War II, the largest segment of our current membership, some half a million, based their eligibility on Vietnam era service. While the reason for belonging to our organization are many and varied, all of our members have a concern for our nation's well-being, particularly in the area of national defense.

This concern has, from the Legion's beginning in 1919 following World War I, manifested itself in the resolutions annually adopted at its national conventions.

Today my appearance and the position I take on amnesty are based upon resolution 207 adopted at our 1971 National Convention.

A copy of this resolution is appended to this statement and I respectfully request that it be made a part of the official records of these hearings. The delegates who unanimously adopted resolution 207 represented everyone of the 50 States and the District of Columbia. They were all honorably discharged veterans of wartime service and represented a cross-section of American ethnic, cultural, political and economical life. Resolution 207 also has unanimous support of the American Legion Auxiliary whose nearly 1 million members are the wives, mothers, sisters, and daughters of men who served their nation.

Like you, we Legionnaires are deeply concerned over the complex problems presented by the issue of amnesty. It is an emotional problem with overtones of justice, tempered with mercy and understanding. Amnesty is particularly difficult to consider today because of the profound and bitter division in our land over the Vietnam conflict—our longest war and—like the Revolutionary, Mexican and Civil Wars—a bitterly divisive one.

A large number of our young men are involved in the amnesty question—though far more were involved in this question in the Civil War. Today, our Vietnam casualties far outnumber our draft evaders. Over 70,000 by unofficial estimates are either military deserters or Selective Service evaders. For many, their excuse is the immorality of the participation of the United States in the conflict

in Vietnam. Canada, Sweden, and, to a much lesser extent, other countries have given these young men asylum. There cause is now being popularized and propagandized by many and diverse groups in the United States and abroad—including several candidates for high public office in our own country.

Let us hope that as a result of these hearings, earnest and full consideration will be given to all facets of the issue of executive clemency so that we shall be able to discover and follow that difficult line between the dictates of the law and the charity our moral heritage demands. The American Legion has an intense and direct interest in amnesty because of the fact that its member all were subject to the laws, regulations, pressures and responsibilities of military service in defense of the United States. And most also, we are subject to the operation of the Selective Service System.

We believe that we have a real and vital stake in this issue since it concerns basically the rights and responsibilities of the citizen to bear arms in defense of his nation.

In 1783, Gen. George Washington expressed clearly the responsibility of citizenship which I believe goes to the heart of the proposition under discussion. Washington said: "It may be laid down as a primary position and the basis of our system that every citizen who enjoys the protection of a free government owes not only a portion of his property, but even of his personal services to the defense of it." The American Legion was formed to help insure that these rights and responsibilities were carried out in civilian life by those comrades who have borne them in time of war.

Proponents of amnesty at the present time fall into two categories. One group advocates unconditional amnesty for all military deserters and draft evaders. This group reasons that the Vietnam conflict is an immoral war for the United States; that those who recognize this and follow their conscience ought not to suffer any legal penalties for being right while their country was wrong; and, therefore, amnesty should be a blanket recognition of this.

Some spokesmen for this view, go so far as to advocate full veterans' rights and pensions for deserters and draft evaders for their sufferings in Canada, Sweden and elsewhere.

Senator KENNEDY. I hadn't heard that before.

Mr. GEIGER. The second group of proponents offer amnesty to draft evaders but not to military deserters providing that draft evaders prove their sincerity by performing alternate service for their country.

The American Legion believes that most draft evaders and deserters consciously decided to refuse to accept their responsibilities as citizens under the law; that they evaded their responsibilities by flouting our laws and legal remedies rather than by going through the available, legal channels of redress; that their actions in declining to obey certain laws distasteful to them is contrary to sound legal and moral standards; and that the obligations of citizenship cannot be applied to some and evaded by others.

The American Legion resolved that: "We go on record as opposing any attempt to grant amnesty or freedom from prosecution to those men who either by illegally avoiding the draft or desertion

from the Armed Forces failed to fulfill their military obligation to the United States." In other words, we of the American Legion firmly believe that giving any wholesale amnesty—whether conditional or unconditional—would make a mockery of the sacrifices of those men who did their duty, assumed the responsibilities in time of conflict and—in many cases—were killed, seriously wounded, or now lie in a prison camp somewhere in Indochina. Over 50,000 men have paid the supreme price of patriotism and citizenship: Another 302,602 have been wounded or injured. Over 1600 men are prisoners or missing in action in Vietnam, Laos, or Cambodia and the casualties have not ended.

How can any general amnesty be explained to these men? How can amnesty be explained to parents, wives, children—all those who have lost a son, husband, or a father in their country's service? How can we excuse ourselves to the prisoners of war, the missing in action, or to their suffering families for offering amnesty? Furthermore, what would be the effect on the morale of our Armed Forces if amnesty were granted to those who have violated the law and their oath of service by turning their backs and fleeing their country?

In our opinion, it could only badly undermine that morale and cheapen the value of honorable service to one's country—at the very moment these values are most in need of strengthening.

Amnesty might even be the last bitter pill to our servicemen now caught in a web of confusion and held in disdain by those who hate the war and would do anything to drive us out of it in dishonor, including destroying our Armed Forces on the field of battle and their spirit. Our men are fighting the enemy. They are fighting dangerous drugs, they are fighting hatred and misunderstanding at home. They are coping with racial problems and the problems involved in a transitional period in military life and discipline.

We cannot afford to add the issue of a general amnesty to those problems at this time. It is clear from the Legion's resolution that our official opposition to amnesty is not a total opposition to it but an opposition to any sort of amnesty—with or without conditions—to all draft evaders as a class. Our resolution asks that all draft evaders be prosecuted.

This means that we would like each case to be heard in court and tried on its merits. The courts can deal with the particulars of each case and exercise leniency or sternness, based on the actual facts brought out in hearings about each particular draft evader. Surely the courts will find those who are innocent, and who should be excused without any further conditions. It is also implicit in our resolution that those found guilty would still have open to them the right of appeal. Should appeal fail they would have recourse to the President's pardoning power, if, on review of the facts in each case, he wishes to extend additional leniency beyond what the courts may extend.

This is implicit in our resolution, because any request for prosecution implies not only the possible finding of their guilt but the finding of innocence and the avenues for redress, appeal, and pardon are available to all persons who are prosecuted.

Our request that draft evaders be prosecuted does not deny to them their full rights under the law, or the opportunity for Executive clemency. Our resolution, in effect, opposes any form of blanket amnesty, and asks that each case be considered on its merits. The only other example in our history of amnesty for wartime draft evaders certainly bears out the wisdom of this approach—and, of course, it is consistent with the whole American system of justice which is based on hearing the charges and the facts in each case.

After World War II, the Roberts Board tried to treat all 15,805 World War II draft evaders the same, as all proposals for blanket amnesty do. The board threw up its hands at the injustice of such an operation. It found sinners of all degrees, as well as innocent men, among the World War II draft evaders. In the end, with the aid of the Justice Department staff, it reviewed each case. That was not the easy way out but the Roberts Board shouldered the huge job of review rather than accept the onus of dispensing justice by the shovelful.

There are some in this country who would create the illusion that every Vietnam draft dodger was acting on high principle out of deep-seated convictions against war. When all cases were judged individually by the Roberts Board after World War II, nearly half were found to have been men wanted for murder, robbery, desertion of their families, and other serious crimes.

On the other hand, others were found to have been legally exempt from military service, or they fell afoul of the law through ignorance or illiteracy. President Truman gave a complete pardon to 1,523 and a conditional one to 1,518 while more than 12,000 did not merit such treatment. If the Vietnam draft evaders are all prosecuted, courts will be able to judge each case on its merits. They will again find a mixture of victims of error, deliberate conspirators, and professional criminals. The President could then have them screened and consider recommendations for clemency in each case. An act of Congress to provide an across the board 3-year stint of Government service in exchange for amnesty would offer that penance to some for whom it is too heavy a penalty and to others for whom it is too mild a punishment. The most flagrant offenders will get the best break and the least offenders the worst.

This is hardly equal justice under the law. At least 10 Presidents, from Washington to Truman, have handled the amnesty question under existing machinery. An act of Congress that decides all cases without a hearing is neither necessary nor desirable. There was no amnesty granted after the Korean War. It is therefore clear that amnesty has not been lightly given by our modern American Presidents and it has been granted only after the shooting has stopped and the war is over.

Lastly, an argument much used by advocates of unconditional general amnesty is that the Vietnam conflict is immoral, therefore, no American should be prosecuted or punished for refusing to take part in any direct or indirect way in an immoral war. I am not aware of the precise moral standards used by those who would label our military assistance to the Republic of Vietnam immoral. It is rarely defined and the assumption that the Vietnam conflict is now, or was in the beginning, an immoral war is much in dispute.

We Legionnaires reject the simplistic labeling of our effort in Vietnam as immoral. We reject it on the grounds that such allegations are patently false. The United States' commitment to the government and the people of South Vietnam is just and moral. We are committed to providing South Vietnam a means whereby it can defend its independence and its right of self-determination. Our involvement in Vietnam was authorized under proper constitutional procedures and was sustained by the Congress.

The Vietcong were committing genocide in South Vietnam at the time we became heavily involved in that conflict—systematically slaughtering innocent civilians wholesale as a means of gaining political control. We knew this then and we know it now. Everyone within sound of my words knows it, but when discussion of the morality of the Vietnam war arises today, the fact that we intervened against genocide, when the United Nations would not, is simply omitted from the discussion.

One cannot admit it and still define our role in Vietnam as immoral. We hope and believe that the Congress will not decide such a moral question by closing its eyes to genocide. We cannot believe that the Congress will ever decide that those who violated the law have the superior moral position to the President, the Congress and to the men who served.

If Congress should decide that they do, we wonder who next will take up the pretext and use the precedent to claim a moral superiority over some fresh enactments of the Congress. We wonder what future legal dissemblance will be in store for us if we create such an extraordinary precedent as the Congress assenting to the rights of citizens to determine unilaterally which laws they will obey.

Any determination of amnesty based on the moral superiority of draft law violators is contrary to our concept of justice. Historically, the Congress, the President and the Judiciary have struggled to determine the extent of power of each. Should we now add a new dimension to this threesided struggle—namely any citizens who claims that his unilateral view of morality is superior to the Congress, the courts and the President alike?

If we establish this as the correct view, the day will arrive when there will little further use for the Presidents, the courts, or the Congress.

In summary, the American Legion's position on amnesty is: one, we oppose any attempt to grant amnesty now. Two, after the conflict ends, peace is established, and our prisoners of war and missing-in-action have been repatriated or accounted for, each case should be reviewed under existing procedures available to the courts and the President.

Thank you, Senator.

SENATOR KENNEDY. In your summation you indicate that it should be reviewed under existing procedures available to the courts and the President. As you probably understand, there has been considerable historical discussion about the remedy for providing amnesty. One, it is suggested that there would have to be legislative action and secondly, under the constitution and the power of the President, the President could do it administratively.

We have seen in the course of history where the President has done it administratively. For instance, President Truman did so by establishing procedures which you have outlined. President Lincoln in 1862 did it, President Johnson in 1868. I gather you believe that now legislation ought not to be considered but that we ought to use existing powers when at the appropriate time, as conditioned by your statement here, it ought to be done. Would I be accurate in gathering that impression from your testimony?

Mr. GEIGER. Yes, we think that the system of justice are available in this case.

Senator KENNEDY. So that it can be done through administrative action. You see, this is one of the points that we were interested in. Now as I gather further from your comment, you are opposed to any amnesty at the present time. Can I ask you what would be your feeling and the feeling of your organization about young people in Canada who want to come back even while the conflict is going on in Southeast Asia and are prepared to perform some kind of public service. This is a sort of conditional amnesty. There's a rather significant question in my mind as to how many would take advantage of that conditional amnesty even if it were offered, but if there were young people who wanted to come back to perform some kind of public service at the present time, would you oppose any procedures along that line, too?

Mr. GEIGER. Mr. Chairman, I think it is the opinion of the American Legion that American justice is available today either in the military courts for the deserter, or in our civil courts or in the appeals procedures of the Selective Service Act for those who have evaded the draft. If these people through their own choice decide to come back today, they have the right to plead their case the same as any citizen.

Now with respect to the penance that may be applied to them, this could be handled administratively or through the courts. I think that this might be appropriate. I would certainly wish that those who have to suffer the penalties of their acts would be engaged in constructive activities rather than just be incarcerated with no opportunity to utilize their skills.

Senator KENNEDY. The one area—and I would be interested obviously in your personal view—we know the Legion has gone on record on this question, but I would be interested in your view about it. The point is made by many of those who feel that this country ought to be prepared to provide some degree of understanding for the young people who have left because of their feelings about the war, their very sincere moral belief about it, and their very deep feeling about the questions of our involvement in Southeast Asia. I'm sure it's a common feeling within the Legion and among those veterans who have served the country that they were fighting in wars in the past because they had the very firm conviction that their country was right and they believed strongly in what they were doing. I suppose that one of the problems that the country is going to be confronted with is how we respect the very deepseated beliefs and feelings of many young people who feel as righteous in their moral decision not to go to Southeast Asia as those who have served so nobly and bravely and courageously

in Vietnam in carrying the banners forward and in serving their country in the armed forces.

I am interested in your view of a national problem that perhaps moves beyond the questions of individual justice in an individual case but towards the national problem of reconciliation in this country, of trying to bring to it a sense of unity and understanding and respect.

So I am interested in what your view is of the importance of trying to take steps towards reconciliation for this country at the end of the war. How important is reconciliation versus individual justice for each person?

Mr. GEIGER. Senator, the American Legion, as you well know, is actively engaged in activities with young people and thank God our Nation has such a fine, fine group of young people who are responsible. They are becoming involved in all phases of our economic & social life. In their sense of responsibility as citizens they have not sought a personal sanctuary from the problems that we face in our cities, our economy, ecology and all the other problems that we confront. But I think the American Legion's position is quite clear that individual justice should be the yardstick in determining the appeal these people have to return to their country. As the Roberts Board found after World War II, a great many of the people involved in the evasion cases or desertions had motives that were not of high principle. I think that is why we should not make a blanket suggestion as to—

Senator KENNEDY. Or have committed other crimes?

Mr. GEIGER. Yes, or had some personal problem that they fled from that is not at all related to the moral issue.

Senator KENNEDY. Well, let me ask just there, because I don't think there's any question that it would be an extraordinary legislative challenge and an administrative challenge to try to separate those who, as Senator Hart mentioned the other day, have fled to Canada in exile because they had their hand in the company commander's till or have stolen the jeep or have been involved in some other crime.

I don't think any of us are arguing their case. At least I'm not. But if we take it as a very essential part of an American character and American belief of doing what the individual sincerely believes is right, then how are we going to treat the young men who refused to go into military service because of their deep moral opposition to Vietnam. I think this is really the question. Your organization has been traditionally interested in how you heal those who have been wounded with lost limbs. Now we also have a very great obligation to those who have become associated with drugs and to those people who because of battle fatigue are mentally distressed. I think what we've got at the end of the war is a period of reconciliation and compassion. My question is, should the same kind of compassion that we show these victims of the war be extended to those who have serious reservations or moral outrage about the war. Should we be as understanding to these men as victims of the war?

Mr. GEIGER. That's a decision that I think will be made at our national convention at some subsequent time. I think the people that have made this fine moral decision to run away, and have suffered in

their conscience because of having abandoned their country, are doing a great deal of penance today. We would hope that they would realize this themselves and come back to face American justice which, I think, has always been tempered with the things that you discussed—mercy, consideration of the motives that they had, their having had advisors and college professors who might have misled them to renounce their country and their citizenship.

I think though, Mr. Chairman, I should point out that the American Legion has recommended to the President, to the Congress and to the American people that our first priority should be to welcome home the men who have served honorably and assist them in their full readjustment as productive American citizens as soon as possible. This, we think, will stop the devisiveness we have in our Nation as a result of this war.

We should have our men home from every part of the world as soon as possible and we hope that the lessening of world tensions today will allow this in the immediate future.

Senator KENNEDY. I was reminded, when you talked about returning veterans, of a fellow who shot a taxi driver in New York City recently. And he was tried, he was convicted, he was about to be sentenced and the judge asked for the probation report on this fellow. His name is Charles Johnson. He served in Vietnam, was wounded and lost a leg in Vietnam and went to an American military hospital and because of the pain and other factors, he became a drug addict. He returned to the United States and because of the lack of sufficient resources both to provide for his livelihood and to provide for his habit, he had to use the only resource that he had available to him and that he had been trained for and that was a gun. And he went out and he committed the robbery. There was resistance and he shot a man.

Now the judge looked at all of the social agencies in New York City to try to get some agency to provide help and assistance to this person. He was convicted and there wasn't an agency in New York City that was prepared to provide service or help or counseling or guidance to this man. That fellow has just been sentenced to 25 years in Attica State Prison. When you touch upon the country's responsibility to those who have served there, I hope this Nation will recognize this in the broadest possible way. My own feeling is that I would hope also that the same kind of understanding is going to apply to others who, because of sincere beliefs, have expressed them and have taken a different course of action.

Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

Very briefly, I would join you in thanking Commander Geiger for the thoughtful statement.

First I would like to refer to the last thing you said, and that is the effort that the Legion has been making to help to rehabilitate those who have actually gone to Vietnam.

I personally am very grateful to him and the members of the Legion staff for the assistance that they have been giving me in developing the new GI bill, because many of the problems that the chairman has referred to and which have been a plague on young men in this country coming back from the war, are due to the fact

that they went to the war with very inadequate educational preparation.

The GI bill which is now offered to them, by comparison with that that was offered to me at the end of World War II, is totally inadequate.

It is inadequate by the standards of today, and I welcome his help and his leadership in trying to rectify that particular inequity.

I would say that there seems to be a general agreement that the amnesty question is not going to be resolved before the war ends. I think we all share hope that the war ends soon. Yesterday isn't soon enough.

I do think that these hearings are useful. I think that the consideration of the Legion is useful in considering, however, the machinery by which whatever actions taken are going to work. If it is going to be all judicial, as the Commander's statement proposes, then certainly this Judiciary Committee is going to have to consider some provision for courts adequate to handle this enormous load. So this is an area in which I hope the Legion will continue to work. Because the backlog in courts for ordinary litigation is fearful, we had better move rapidly in our thinking about the methods here.

I'm impressed by the course of the argument as to conditional amnesty, amnesty which imposes not only certain immunities, but also certain obligations which may well do violence to traditional American concepts of civil liberty.

All in all, it's been a very useful morning for me. I thank you for coming.

Senator KENNEDY. Thank you very much, Commander. We appreciate your appearance here. It was very instructive.

We see our Massachusetts contingent of the Legion represented here today.

Senator MATHIAS. Let's not overlook Maryland, either.

Senator KENNEDY. We are pleased to welcome Mr. and Mrs. Robert Ransom. Mr. Ransom originally was to speak yesterday, and was unable to do so because of illness.

Mr. Ransom is an attorney in the general counsel's office of IBM, and in the past several years has been active in draft counseling. He is a Gold Star Parent. His son was killed in Vietnam, and he is particularly concerned about the question of amnesty. We are pleased he has decided to be with us.

STATEMENT OF MR. AND MRS. ROBERT RANSOM, GOLD STAR PARENTS

Mr. RANSOM. I apologize for my inability to be with you yesterday and for upsetting your schedule. In addition to what you said about me by way of introduction, I might add also that the last several years, in my spare time, I have involved myself with draft counseling and advising. My wife and I very much appreciate the opportunity to be here and express briefly some of our thoughts on the broad general subject of amnesty and to try to relate, specifically, my own experience in trying to work under the Selective Service law.

But if I were to be granted the power to influence this Committee's thinking on only one very narrow point, it would be this: I would like to be able to dispel forever that popular and prevalent misconception that it would dishonor the nearly 56,000 Americans who have died in Vietnam to grant amnesty now to these many of our children who have opposed participation in the way by one means or another.

Time and again we hear this "dishonor" thought repeated. On January 24, 1972, it was expressed in the political cartoon on the editorial pages of the New York Daily News. The scene is a military cemetery. The ghost of a U.S. Vietnam casualty is perched atop his own gravemarker, reading a newspaper whose headline proclaims: "Amnesty Now for Deserters." The caption to the cartoon is the one word, "Unspeakable."

When Senator Taft presented his very narrow-gauged and highly punitive amnesty bill (S.3011) to the Senate on December 14, 1971, his introductory remarks included the following statement: "When over 55,000 young Americans have lost their lives serving their country in Southeast Asia, we should not simply welcome back the draft resisters without any endeavor or requirement on their part to undertake service for their country."

Recently, amnesty, with particular reference to the Taft bill, was the subject of a panel discussion at a church in Manchester, Vt.; near where I have a vacation home. The discussion leader was a past commander of the State VFW. The account of the meeting in the Manchester Journal attributes this to him: "He favored those returned to the United States facing their peers or the families of men killed in Vietnam."

The theme is constant. But I would submit to you that it is not for the press, nor for other private citizens, nor for members of the Congress to presume to speak for the families of those who have died in Vietnam.

Through our own most personal tragedy we can view the Vietnam war with a perspective that is simply not available to the rest of you. From the anguish that we and our sons endured as we came to grips with the grim realities of Vietnam, we can perhaps uniquely comprehend what has gone on within the minds and consciences of those who have left the country, who have deserted, or who have gone to jail. I would suggest that we can best comprehend and sympathize with the notion of amnesty.

In our case, our oldest son died nearly 4 years ago. He was so opposed to what the United States was doing in Southeast Asia that he very nearly did not board the plane that was to take him there. The alternative, of course, was 6 years in jail.

My greatest regret is that I did not try to put more pressure on him to follow the dictates of his conscience. While we realize that this life was utterly wasted, that fact is now beyond recall.

When Mike died, we had two other sons already subject to the Selective Service System, with three others following along closely. I determined then that I would become as expert as possible in the intricacies of that System.

In my efforts to educate myself, I became appalled at how little sound, legal advice there actually was available to our young men, in

spite of the fact that the Selective Service statutes and regulations have always constituted a clearly defined body of law, readily available to the legal profession as a source of additional practice. I find it significant that in the past 3 years I have counseled the sons of partners in several of New York's largest law firms, and for no better reason than that their fathers could not find among their 100 to 200 partners and associates any lawyers who was competent to even discuss draft matters intelligently.

The foregoing is significant only in that it indicates the vacuum into which we let our sons fall. They saw the inequities that abounded in the system, particularly in the era from 1967 to 1969. Not only did the law itself have built-in injustices, but it was even more shocking to see the differences in the way the law was applied from one local board to another, often in neighboring towns.

Those unfortunate enough to be caught by the System saw themselves shunted off to a remote war that by and large they did not believe in. They had seen at home that the war was equally remote from our hearts and thoughts, and they saw life in the United States proceed as if the war barely existed, perhaps even somewhat enhanced by the prosperity that the war economy had made possible.

I find it little wonder that, left largely to their own resources, large numbers of them began to seek alternatives. Some men have chosen to stay and face the Federal court system, and go to jail for their convictions. Others have elected to leave the country, mostly going to Canada. The first was a group that went either before registering or before they had reached the induction notice stage with their draft boards. The second group consisted of those who were specifically avoiding induction.

However, I might add that I also know some who have gone who had perfectly legitimate deferments, but who simply felt obliged to absent themselves from a system that could foster and support a Vietnam.

Finally, in 1969, a group of peace organizations conducted a negotiation with the Canadian Government which resulted in their agreement to also make landed-emigrant status which is necessary if a man is to be able to work, available to deserters, so a new emigrant group was started.

We have all heard it said that many of those who went to Canada received bad advice, and we are all reminded that local draft board decisions are subject to appeal. Perhaps some few of them did receive bad advice, but again, there was so little advice of any sort available.

To have consulted their boards was virtually hopeless. In my own situation, involving several hundred draft cases, I do not know of a single instance in a difficult or complicated case where a local board gave a registrant a full and complete exposition of his rights, and the alternatives available to him.

Aslo, in the many appeals with which I have been personally involved, not only have I never won such an appeal but I also never so much as received one vote from the three appeal agents involved in each such case. In several such situations, I was later able to have the errors made by the boards corrected by higher administrative action or by recourse to the courts.

What this means was that the system was a travesty and farce to the young men involved in it. The laws said, for example, that conscientious objectors could either do noncombat or alternate service, and yet those registered were all too familiar with the long parade of applicants who were turned down because the World War II-Korea mentality that dominated most of the System did not choose to believe in their sincerity. Until comparatively recently, there were entire States within the System that had the reputation for never, or at best only rarely, granting a CO application.

Among the deserters in Canada, I also know that some are there because their in-service claims for CO status were erroneously turned down.

And so, in conclusion, I would submit that the untenable position into which we forced these young men is responsible for their predicament today. These are our sons, and we need them back. They did not deserve what we have done to them.

It would be most gratifying to me if I felt that I could have contributed in any small measure towards the granting of the broadest kind of general amnesty—one without penalties and conditions. I would consider it to be my personal Mike Ransom memorial general amnesty bill. That would have pleased him.

Thank you.

Senator KENNEDY. Mrs. Ransom, we want to welcome you here too.

Mrs. RANSOM. Could I make one comment?

I think it was referred to in the hearings yesterday, but I am concerned, I think it's terribly important that we give serious consideration to the problems of amnesty, but I do hope that it doesn't divert attention from the fact that the war really isn't over yet and hostilities haven't ceased.

So, to go on, there are two statements attached to my remarks which I think are significant. One is a statement on amnesty made this past January at the Ecumenical Witness Council held in Kansas City, a religious assembly of 650 Protestant, Catholic, and Jewish leaders. In brief, the statement urges a broad general and plenary amnesty without any qualifications or conditions for all those who have been prosecuted or face possible prosecution by civilian or military courts for any alleged offenses arising out of the war. With this, I totally concur, and remind you again, that these are our children that we are talking about.

I would like to submit that my experiences with the son we lost, and with his brothers and their friends, is that we as parents have not been able to give them adequate reasons for dying, or for killing other human beings in violation of everything we had taught them to believe. We are very uncertain of the justice of our country's cause, and in fact, we have come reluctantly to the view that our son's death served no useful purpose for his country.

Now I want to stress something else, particularly in light of what Mr. Kelley said yesterday. I understand so well his anguish—I mean, to lose a child is one of the terrible things that can happen to you, and I think that you need to find a reason, something good that can come out of it, so I sympathize tremendously with what he had to say.

However, the fact that we have come to our bleak conclusion, does not mean that we shall ever underestimate the courage and dedication of the young men who have died. If it were not for their participation, many more of their fellow Americans would not be alive today. Their medal citations certainly give ample testimony to this.

Your brother, Senator Robert Kennedy, wrote us upon the death of our son and in his letter he quoted Winston Churchill: "Courage is rightly esteemed as the first of all human qualities because it is the one that guarantees all the others."

This our young soldiers eminently and certainly had. No matter what the outcome of the war, or history's judgment upon it, nothing can ever diminish the honor in which we shall always hold them.

However, I plead with you not to underestimate that it may have taken another kind of courage to go into exile or to jail. It is not easy to go against the tide of public opinion in support of conscience.

The other attached statement was written by the late Chief Justice Harlan Fiske Stone in 1919, and I think it answers the questions that you were posing to the American Legion commander. I won't read it here, but he talks of the great value to the state of liberty of conscience, and the danger to the state if it violates the conscience of the individual.

I believe that the vast majority of these young men to whom we now address ourselves felt that their very consciences would be violated if they participated in the Vietnam war.

Justice Stone also said that nothing short of the self-preservation of the state should warrant such a violation of the conscience. Surely, to offer amnesty to all of these young men could not possibly jeopardize the safety of the state. In fact, it would enhance it, since so many of them are deeply committed to social justice.

Perhaps it would be very hard for us to say that what these men did in their various ways was right, but neither do I believe that we can say that they were wrong.

Thank you.

[Applause.]

Senator Kennedy, I have some questions for you, but we have to vote right now.

Senator MATHIAS. Let me just say, because I have no questions, that I want to thank both Mr. and Mrs. Ransom for being here.

I have some sense of what it must cost you to be here, and I was much touched by the statement that you feel your son's death was a waste of life, and I know what you mean.

At the same time, I hope you would feel that from our point of view what you are doing for his sake and what you're doing, I'm sure, for all the other many young men you have counseled, gives a meaning to his life and to his death and the manner of it, and I hope that that gives you some sense of satisfaction.

Senator KENNEDY. Senator Hart?

Senator HART. Mr. Chairman, my apologies to you and to the Ransoms for my late arrival. I was at the dentist.

Coming in, on the radio, I heard the testimony of the commander of the American Legion, and I'm grateful to have had a chance to at least arrive in time to thank the Ransoms.

Senator KENNEDY. We will recess for about 10 minutes, and then I hope you can stay with us.

(A brief recess was taken.)

(The following was submitted with the Ransom's prepared testimony:)

APPENDIX

The following statement on amnesty was adopted by the Ecumenical Witness Conference in Kansas City, January 13-16, 1972. Sponsored by the National Council of Churches, it was a religious assembly of Protestant, Roman Catholic, Eastern Orthodox, and Jewish church leaders.

The religious community of the United States, as represented by the Ecumenical Witness, aware that the War in Indochina must be brought to an immediate end, urges the implementation thereupon of a broad, general and plenary amnesty, without any qualifications or conditions, to all those men and women who have been prosecuted or face possible prosecution by civilian or military courts for any alleged offenses arising out of the War, as well as the meeting of our social responsibility to those who might refuse amnesty, to the civilian members of the resistance, and to those who have served in the military. We urge this amnesty in order to overcome the paralyzing divisiveness of the war on our society and in order to mitigate as far as possible the tragic consequences of the War upon that generation that has been called upon to bear the heaviest existential burden of this war.

We believe that amnesty will be one step toward the reconciliation of the society, but we do not believe that amnesty itself will constitute atonement of the society's responsibility for the War nor will it be in the nature of forgiveness for any offenses, but rather an effort to give ourselves the benefit of the moral courage and idealism of the men and women of the young generation. We call upon the religious community further to cooperate with other groups in the society pursuing this objective and to implement this commitment by appropriate educational and other supportive action within their own constituencies.

"The ultimate test of the course of action which the state should adopt will of course be the test of its own self-preservation; but with this limitation, at least in those countries where the political theory contains that the ultimate end of the state is the highest good of its citizens, both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."

—HARLAN FISKE STONE, 1919.

Senator KENNEDY. The subcommittee will come to order.

Can you tell us a bit about your son? He enlisted in the Army?

Mr. RANSOM. He enlisted one step ahead of the draft board, and went ultimately to Vietnam, in early March of 1968.

He went as a second lieutenant, and he was a platoon replacement. On March 16, which happened to be My Lai Day, he was assigned to the light infantry, the 11th Light Infantry Brigade, which was of course the unit involved in My Lai; 4 weeks after taking that assignment, he was slightly wounded by a mine, returned to his unit, hit another mine himself and died 8 days later, on May 8, 1968.

Senator KENNEDY. Now there are those that suggest by considering amnesty for those who have left the United States because of moral reservations about the war, that if we were to grant them amnesty, that somehow, you would dishonor those who bear the uni-

form of the United States, and you would particularly dishonor those who had lost their lives in Vietnam.

As a parent who has lost a son there, how do you view that.

Mr. RANSOM. Well, that of course is the myth I would like to dispell.

We know perfectly well how our own son felt about the war, and its immorality, and the fact that we didn't belong there.

As I say, the only thing—when he left our home to go to the west coast to report to his plane, we didn't know whether or not he was going to get on that plane, because his convictions were so strong. The only thing I think that took him off, finally, was the optimism of youth that of course this isn't going to happen to me; the fact that he knew perfectly well that he would face 6 years in jail; plus the fact that he was a sufficiently conscientious person that he thought that even going into an immoral situation, that he sincerely believed he could help his fellow man, and he went in that spirit.

Mrs. RANSOM. May I add that I think that he would have understood perfectly somebody unable to go, and if he could, certainly we can.

And I don't see how in any way it would dishonor them. He certainly would not have had the opinion that if Joe Jones had gone, I might not be dead. I just don't think in this kind of situation that you can say that.

Senator KENNEDY. Sometimes, it is suggested, that those who have serious reservations about the involvement in Vietnam and have left the country because of it, are somehow cowards, or gutless, ashamed to do their duty.

Certainly there are no two people who knew their son better than the two of you.

I'm interested in what you could tell us about his views. In his reservation about going to Vietnam, did you detect a lack of courage, or was it because of a higher sense and higher purpose of a very deep and sincere moral concern and commitment and outrage about the involvement in Southeast Asia.

Mr. RANSOM. I think clearly the latter. I wouldn't pretend for a moment that he didn't write to us constantly of his fear of combat, and having been a veteran myself, I can only say I know whereof he speaks. I don't think that a man who goes into combat can look forward to it, and he was afraid.

But that was not the motivation.

Mrs. RANSOM. Again, I'd like to add that I think that, although he was quite convinced—he had read a lot of things, and he talked to people who had come back from Vietnam, and he was interested in finding out why we were in Vietnam, what we were doing there; and it was important to him to understand that.

And also, when he got there, his letters clearly indicated that no Vietnamese person that he encountered wanted him there. So he was questioning enough to wonder what in the world all this misery that he was in the middle of was going to accomplish; and he wrote that.

So I think that when we're talking about courage, or people not being courageous, I don't think that enters in exactly. I mean, he was afraid. He was certainly afraid of being killed. In fact, he

wrote of his first encounter which dealt with the first man he lost in his platoon. He stepped on a mine and was completely blown apart before his very eyes; and it angered him, and it certainly frightened him.

But I just have the feeling that he wasn't the kind of person that would feel that somebody who refused to go was lacking in courage.

Senator KENNEDY. Let me ask you, Mr. Ransom—you're a lawyer for one of the great companies of this Nation, and you favor amnesty.

As a lawyer, how are we going to live in an orderly society, in a legalistic society, if we are going to expect that young people or old people are going to be solely guided by their moral beliefs, as legitimate as they may be; that they are going to take upon themselves the responsibility to violate a law and then the country is prepared to grant them amnesty?

How are we going to have a system of laws, and have an orderly society, if we are going to follow that course of action?

Mr. RANSOM. Well, I simply think we have to make an exception in this war.

I think this has been an extraordinary and unique situation in destroying the confidence of an entire generation in what their country stands for; and I think the only way to set that entire generation back, one of the ways, is certainly to grant amnesty to those who did have the moral convictions to live by their consciences in spite of the law.

I agree with you, it certainly would be hard to conduct the war if you were to grant amnesty in the middle of it; but now that there's a prospect that the war may soon be over, I think that it is most appropriate to try to redeem these people.

Senator KENNEDY. And you think we should do that now, or at the end of the war, or when?

Mr. RANSOM. I would like to see it come the minute the war is over.

I don't wish, as my wife said, to have us delude ourselves into talking about amnesty, if a part of that is to do this because we think the war is over, because it certainly isn't.

There were 1400 killed or wounded in Vietnam last week. We seem to take comfort from the fact that two of those were American dead, and 20 were American wounded; but the war goes on, very much so.

Senator HART. When amnesty is granted, as you urge that it should be, would you advise us to process it on a case-by-case basis?

Mr. RANSOM. No, sir; I would not.

I think the problem is far too big to handle that way. I think it's got to be a general amnesty, I think it's got to be nonpunitive without conditions.

I think if you base amnesty for this generation of our young people on forgiveness, they're going to say we don't want your forgiveness.

Senator HART. But some of us are troubled by the all-inclusive nature of those in Canada if the grant of amnesty is other than selective.

There are, I assume, men in Canada who are carried as deserters, or registrants who didn't report, or whatever, who really went to Canada because they just robbed a bank or some outrageous thing like that.

How do you handle that?

Mr. RANSOM. I don't think that the amnesty should embrace the persons who went there for other than reasons of conscience. I think what you say is particularly true with regard to the relatively smaller group in Sweden, for example.

There are of course in Canada many people who have not broken any law because they left before they broke it. But there are admittedly also runaways in Canada, kids who are simply getting away from home anyway, or perhaps they had a drug problem when they went.

I don't include those, and I don't know the mechanics of how you would separate the two groups out, but I would indeed make the distinction.

Senator HART. And once you would agree that that distinction has to be drawn, logically I think that you are almost compelled to admit the need for some mechanism to identify from among the total those who by reason of conscience left. And that would be a very difficult problem.

Mr. RANSOM. I will give that some thought, and try to submit a paper to you later.

Senator HART. Though not directly on the subject of Senator Kennedy's hearings, given your experience now, would you suggest how we should handle, if there is another selective service act, the treatment of the man who has conscientious objection to a particular war as distinguished from the existing requirement of an across the board objection to war?

Mr. RANSOM. I have generally favored selective conscientious objection, but of course that is not a part of the law.

But I'm not sure just yet that you can run a war if you can permit selective conscientious objection. I think the real tragedy is not whether or not you have selective conscientious objection, but whether a person who is an objector can get by his draft board.

Of course you are taking care of a part of that now by permitting a man to be represented before his board, but one of my own sons went for his conscientious objector hearing, and asked if he could take his minister as a witness, and of course he was turned down. And not only was he denied the right to have his own witness, but he was also denied his conscientious objector status.

Senator HART. Well, I would thank you particularly for your willingness to serve as a draft councillor. I've had some experience with my own sons in this area, and it is incredible the fog into which an 18- or 19-year-old is catapulted.

Mr. RANSOM. And I'm afraid we as a legal profession abdicated our responsibilities to these kids absolutely.

Senator HART. And finally, you mentioned the business of who speaks for those who died. Who really can claim to know what they would counsel us this morning if they were here.

The one certain thing that I would imagine is that they would be the strongest petitioners for peace in the world. What they would say about amnesty I wouldn't even want to guess.

Senator MATHIAS. Again, I want to thank you, Mr. and Mrs. Ransom.

Senator KENNEDY. You've been a great service to this committee, and we appreciate very much your being here.

Mr. O'Neil. James A. O'Neil, member of the Truman Amnesty Review Board. Mr. O'Neil is the only living member of the Presidential Amnesty Review Board created by President Truman after the Second World War. He sat as one of the three members of the Board for a year, meeting mainly on weekends and holidays, trying to sort out the cases of those Americans considered for amnesty under the criteria established.

We are pleased that you should be with us today and give us your thoughts, the parallels and differences between the situation in World War II and today, as well as, I think, the mechanism that was established.

STATEMENT OF JAMES O'NEIL, TRUMAN AMNESTY BOARD

Mr. O'NEIL. Mr. Chairman, Senators Hart and Mathias, unfortunately I am the only surviving member of the Amnesty Board, appointed by President Truman on December 23, 1946.

Senator MATHIAS. And since this situation has come about, I hope that is one which is continued for many years.

Mr. O'NEIL. May I say this at the outset, that the question of general amnesty arose at the initial meetings of the Board, which was in January of 1947.

I have not prepared a statement as such, Mr. Chairman and members of the subcommittee, but I do have the report of the President's Amnesty Board, the first and final report, which was delivered in December of 1947; and I would respectfully suggest that it be incorporated as part of the record of the proceedings.

(The report referred to follows:)

REPORT OF THE PRESIDENT'S AMNESTY BOARD

The President's Amnesty Board, established by Executive Order of December 23, 1946, to review convictions under the Selective Training and Service Act of 1920, has completed its task and submits this, its first and final report.

Before adopting any general policies, the Board heard representatives of interested parties and groups. It heard representatives of historic peace churches, of the Federal Council of Churches of Christ in America, leaders of the Watchtower Bible and Tract Society (whose followers are known as Jehovah's Witnesses), officials of the U.S. Army and Navy, and the National Headquarters of Selective Service, representatives of citizen's groups, veterans' organizations and pacifist organizations, some of the violators themselves, formerly inmates of penal institutions, appeared, either in person or by representatives and were heard.

In perhaps one half of the cases considered, the files reflected a prior record of one or more serious criminal offenses. The Board would have failed in its duty to society and to the memory of the men who fought and died to protect it, had amnesty been recommended in these cases. Nor could the Board have justified its existence, had a policy been adopted of refusing pardon to all.

In establishing policies, therefore, we were called upon to reconcile divergencies, and to adopt a course which would, on the one hand, be humane and in accordance with the tradition of the United States, and yet, on the other hand, would uphold the spirit of the law.

Examination of the large number of cases at the outset convinced us that to do justice to each individual as well as to the nation, it would be necessary to review each case upon its merit with the view of recommending individual pardons, and that no group would be granted amnesty as such.

Adequate review of the 15,805 cases brought to our attention would have been impossible had it not been for the cooperation of government departments and agencies, such as the Office of the Attorney General, the Federal Bureau of Investigation, the Bureau of Prisons, the Criminal Division of the Department of Justice, the U.S. Probation Officers, the Administrative Office of the U.S. Courts, U.S. Attorneys throughout the country, the Armed Forces of the U.S., and the Headquarters of Selective Service. The records of these offices were made available, and those in charge furnished requested information.

The information derived from all sources was briefed by a corps of trained reviewers. It included such essential data as family history, school and work records, prior criminal record, if any, religious affiliations and practices, Selective Service history, nature and circumstances of offenses, punishment imposed, time actually served in confinement, custodial records, probation reports, and conduct in society after release. In addition, the Board heard in most instances psychiatric reports for one or more voluntary statements by the offender concerning the circumstances of the offense.

When the Board organized in January 1946, about 1,200 of 15,805 violators of Selective Service were in penal institutions, the number diminished daily. At the present time there are 626 in custody; 550 of these have been committed since the constitution of this Board. The work of the Board was directed chiefly to examining the propriety of recommending restoration of civil rights to those who have been returned to their homes.

In analyzing the cases we found that they fell into classes, but that in each class there were exceptional cases which took the offender out of the class and entitled him to special consideration. The main divisions into which the cases fell were: (1) those in violation due to a wilful intent to evade service; and (2) those resulting from beliefs derived from religious training or other convictions.

At least two thirds of the cases considered were those of wilful violations, not based on religious scruples. These varied greatly in the light of all the relevant facts disclosed in each case. It became necessary to consider not only the circumstances leading up to the offense, but the subject's background, education and environment. In some instances what appeared a wilful violation was in fact due to ignorance, illiteracy, honest misunderstanding or carelessness not rising to the level of criminal negligence. In other cases the record showed a desire to remedy the fault by enlistment in the Armed Forces.

Many of the wilful violators were men with criminal records; many whose record included murder, rape, burglary, larceny, robbery, larceny of Government property, fraudulent enlistment, conspiracy to rob, arson, violations of the narcotics law, violations of the immigration laws, counterfeiting, desertion from the U.S. Armed Forces, embezzlement, breaking and entering, bigamy, drinking benzedrine to deceive medical examiners, felonious assault, violations of National Motor Vehicle Theft Act, extortion, blackmail, impersonation, insurance frauds, bribery, black market operations and other offenses of equally serious nature; men who were seeking to escape detection for crimes committed; fugitives from justice; wife deserters; and other who had ulterior motives for escaping the draft. Those who for these or similar reasons exhibited a deliberate evasion of the law, indicating no respect for the law or the civil rights to which they might have been restored, are not, in our judgment, deserving of a restoration of their civil rights, and we have not recommended them for pardon.

Among the violators, quite a number are now mental cases. We have made no attempt to deal with them, since most of them remain in mental institutions with little or no chance of recovery. Until they recover mental health, their loss of civil rights imposes no undue burden.

The Board has made no recommendation respecting another class of violators. These are the men who qualify for automatic pardon pursuant to Presidential Proclamation No. 2676, dated December 24, 1946. They are the violators who, after conviction, volunteered for service in the Armed Forces prior to December 24, 1945, have received honorable discharges following one year or more of duty. Most of those who, prior to the last-mentioned date and subsequent to that date, entered the Army and received honorable discharges with less than a year of service have been recommended for pardon. These men have brought themselves within the equity of Presidential Proclamation No. 2676.

The second class of violators consists of those who refused to comply with the law because of their religious training, or their religious, political or sociological beliefs. We have classified them, generally, as conscientious objectors. It is of interest that less than six per cent of those convicted of violating the act asserted conscientious conviction as the basis of their action. This percentage excludes Jehovah's Witnesses, whose cases were dealt with hereafter. Although the percentage was small, these cases presented difficult problems.

The Selective Service Boards faced a very difficult task in administering the provisions concerning religious conscientious objection. Generally speaking, they construed the exemption liberally. Naturally, however, Boards in different localities differed somewhat in their application of the exemption. In recommending pardons, we have been conscious of hardships resulting from the factor of error.

Many of the Selective Service Boards did not consider membership in an historic peace church as a condition to exemption to those asserting religious conscientious objection to military service. Nor have our recommendations who were members of no sect or religious group, if the subject's record and all the circumstances indicated that he was motivated by a sincere religious belief. We have found some violators who acted upon an essentially religious belief, but were unable properly to present their claims for exemption. We have recommended them for pardon.

We found that some who sought exemption as conscientious objectors were not such within the purview of the Act. These are men who asserted no religious training or belief but founded their objections on intellectual, political or sociological convictions resulting from the individual's reasoning and personal economic or political philosophy. We have not felt justified in recommending those who thus have set themselves up as wise and more competent than society to determine their duty to come to the defense of the nation.

Some of those who asserted conscientious objectors were found to have been moved in fact by fear, the desire to evade military service, or the wish to remain as long as possible in highly paid employment.

Under the law, the man who received a IV-E classification as a conscientious objector, instead of being inducted into the Armed Forces, was assigned to a Civilian Public Service Camp. The National Headquarters of Selective Service estimates that about 12,000 men received this classification, entered camps and performed the duties assigned them. Certain conscientious objectors refused to go to such camps, refused to comply with regulations and violated the rules of the camps in various ways as a protest against what they thought unconstitutional or unfair administration of the camps. Some deserted the camps for similar reasons. We may concede their good faith. But they refused to submit to the provisions of the Selective Service Act, and were convicted for their intentional violation of the law. There was a method to test the legality of their detention in the courts. A few of them resorted to that method. Where other circumstances warranted we have recommended them for pardon. But most of them simply asserted their superiority to the law and determined to follow their own wish and defy the law. We think that this attitude should not be condoned, and we have refrained from recommending such persons for favorable consideration, unless there were extenuating circumstances.

Closely analogous to conscientious objectors, and yet not within the fair interpretation of the phrase, were a smaller, though not inconsequential number of American citizens of Japanese ancestry who were removed in the early stages of the war, under military authority, from their homes in definite

coastal areas and placed in war relocation centers. Although we recognize the urgent necessities of military defense, we fully appreciate the nature of their feelings and their reactions to orders from local Selective Service Boards. Prior to their removal from their homes, they had been law-abiding and loyal citizens. They deeply resented classification as undesirables. Most of them remained loyal to the U.S. and indicated a desire to remain in this country and to fight in its defense, provided their rights of citizenship were recognized. For these we have recommended pardon, in the belief that they will justify our confidence in their loyalty.

Some 4,300 cases were those of Jehovah's Witnesses, whose difficulties arose over their insistence that each of them should be accorded a ministerial status and consequent complete exemption from military service, or Civilian Public Service Camp duty. The organization of the sect is dissimilar to that of the ordinary denomination. It is difficult to find a standard by which to classify a member of the sect as a minister in the usual meaning of that term. It is interesting to note that no representations were made to Congress when the Selective Service Act was under consideration with respect to the ministerial status of the members of this group. Some time after the Selective Service Act became law, and after many had been accorded the conscientious objector status, the leaders of the sect asserted that all of its members were ministers. Many Selective Service Boards classified Jehovah's Witnesses as conscientious objectors, and consequently assigned them to Civilian Public Service Camps. A few at first accepted this classification, but after the policy of claiming ministerial status had been adopted, they changed their claims and they and other members of the sect insisted upon complete exemption as ministers. The Headquarters of the Selective Service, after some consideration, ruled that those who devoted practically their entire time to "witnessing," should be classified as ministers. The Watchtower Society made lists available to Selective Service. It is claimed that these lists were incomplete. The Selective Service Boards' problem was a difficult one. We have found that the action of the Boards was not wholly consistent in attributing ministerial status to Jehovah's Witnesses, and we have endeavored to correct any discrepancy by recommending pardon to those we think should have been classified.

The sect has many classes of persons who appear to be awarded their official titles by its headquarters, such as company servants, company publishers, advertising servants, etc. In the cases of almost all these persons, the member is employed full time in a gainful occupation in the secular world. He "witnesses," as it is said, by distributing leaflets, playing phonographs, calling at homes, selling literature, conducting meetings, etc. in his spare time, and on Sundays and holidays. He may devote a number of hours per month to these activities, but he is in no sense a "minister" as the phrase is commonly understood. We have not recommended for pardon any of these secular workers who have witnessed in their spare or non-working time. Many of them perhaps would have been granted classifications other than I-A had they applied for them. They persistently refused to accept any classification except that of IV-D, representing ministerial, and therefore, complete exemption. Most of their offenses embraced refusal to register, refusal to submit to physical examination, and refusal to report for induction. They went to jail because of these refusals. Many, however, were awarded a IV-E classification as conscientious objectors, notwithstanding their protestation that they did not hand it. These, when ordered to report to Civilian Public Service Camp, refused to do so and suffered conviction and imprisonment rather than comply. While few of these offenders had theretofore been violators of the law, we cannot condone their selective service offenses, nor recommend them for pardons. To do so would be to sanction an assertion by a citizen that he is above the law; that he makes his own law; and that he refused to yield his opinion to that of organized society on the question of his country's need for service.

In summary we may state that there were 15,805 Selective Service violation cases inducted. In this total there were approximately 10,000 willful violators, 4,300 Jehovah's witnesses, 1,000 religious conscientious objectors and 500 other types. Of this total 612 were granted Presidential pardons because of a year or more service with honorable discharges from the Armed Forces. An additional approximate 900 entered the Armed Forces and may become eligible for pardon upon the completion of their service. When the Board was created,

there were 1,200 offenders in custody. Since that date an additional 550 have been institutionalized. At the present time, there are 626 in confinement, only 76 of whom were in custody in January 6, 1947.

Tabulation

Convictions under Selective Service Act considered.....	15,805
Willful violators (nonconscientious objectors) (approximately)	10,000
Jehovah's Witnesses (approximately).....	4,300
Conscientious objectors (approximately).....	1,000
Other types of violators.....	500
Those who have received Presidential pardons under Presidential Proclamation 2676, dated Dec. 24, 1945 (approximately).....	618
Those who entered the Armed Forces and may be receiving pardon (approximately).....	900
Total	1,518
Recommended by this Board	1,523
Total recommended for pardon and who may earn pardon through service in the Armed Forces	3,041

The Board recommends that Executive Clemency be extended to the 1,523 individuals whose names appear on the attached list, attested as to its correctness by the Executive Secretary of the Board, and that each person named receive a pardon for his violation of the Selective Training and Service Act of 1940 as amended.

Mr. O'NEIL. I reiterate that in the initial session of the Board, the question of general amnesty such has been proposed here was raised, and after some discussion and deliberation, it was decided that even though it would be a monumental task, that we should examine each case, and base our decisions on the merits of each case.

There were 15,805 cases before us. In order to accomplish this and do it within a reasonable time, an appeal was made to the then Attorney General, Tom Clark, to furnish us with some experienced reviewers from the staff of the Justice Department.

And that was done; and in fairness to them, without their help, and all the records they assembled, we would have been unable to complete the task even in the 1 year in which it was done.

The Board was appointed, I believe, because President Truman was faced with some of the problems that have arisen in connection with the war in Vietnam. It would be ungracious of me to say why he did, or even why I was chosen; but the Board members included Associate Justice Owen J. Roberts as chairman, from the Supreme Court—he had recently retired—and Willis Smith, who was then the president of the American Bar Association, and later U.S. Senator from North Carolina.

So in the mechanics of the operation, with the help of the reviewers we had the most complete records of all of those cases that were before us for consideration. And in the final report to the President of the United States, it was recommended that 1523 be granted amnesty, and in view of the proclamation of December, 1945, some 1518 other cases were granted amnesty.

So, a total of approximately 3,041 cases were given amnesty out of the World War II total of 15,805.

Senator KENNEDY. If you will excuse us, that is a 5-minute warning; we'll recess for 10 minutes.

(A brief recess was taken.)

Senator KENNEDY. We will come to order, please.

Mr. O'Neil?

Mr. O'NEIL. Yes, Mr. Chairman.

I would like to make this observation, on the question of general amnesty.

When the report was submitted to President Truman, Chairman Roberts stated to the President, that "I never realized that there were so many men that were not entitled to amnesty." after he had explained the opening discussions we had on the question.

And based upon the experiences of the Board as I view them, I am satisfied that because there are many close parallels between this situation as it existed at the end of World War II, at the time we were engaged in making decisions, and the current era and the Vietnam conflict, that I feel sincerely that each case should be decided upon its own merits. And I say that because we found, as Justice Roberts so aptly said, there were so many who were not entitled to amnesty. I have no idea about the present situation.

I recognize that we have many, many more cases to consider, but the monumental task should not deter us from doing what we think should be done properly. And because of the time element, Mr. Chairman, possibly my best contribution would be made by submitting myself to such questions that you might have, or any other members of the committee.

Senator KENNEDY. Thank you very much, Mr. O'Neil.

As I understand, through the history of this period and the establishment of the Board, one of the considerations of the Board in deciding the way to proceed was the recognition that a number of the 15,000 people whose records you were going to be examining were involved in other offenses.

Is that correct?

Mr. O'NEIL. That is correct. And we discovered that many of them, even though they were criminal offenses, were outside the purview of selective service and its evasion itself, they were related to the question of having been notified whether they were going to be subjected to selective service.

In other words, they were fleeing justice, as we might say.

Senator KENNEDY. I see.

And so they went ahead to try to consider them individually.

But I also understand that the decision was made by the Board to consider different classes of individuals. Is that not correct?

Mr. O'NEIL. That is correct, Mr. Chairman.

Senator KENNEDY. Could you tell us a little bit about that?

Mr. O'NEIL. In setting this up, first of all we had one classification and all individuals were notified that they could appear before the Board; and some took advantage of that, others were represented by attorneys in appearing before the Board, and many organizations appeared.

But in setting up the classifications at the outset, there was one class, the Jehovah's Witnesses, and that constituted 4,304 cases. They had one lawyer representing them, a man by the name of Mr. Covington. And the basis of his contention was that all should be granted

ministerial status, and we recognized that too, and some were, and were recommended for amnesty.

But that immediately removed 4,304 cases from our consideration, other than make the recommendations that we did.

Now, the reviewers set up categories in all classifications. Some, where there were some errors in the Selective Service System, in having classified some who were illiterate, who did not understand the law, and some who were Japanese citizens who had been relocated and of course were unavailable to answer the call of the draft board; and recommendations for amnesty for all of those were included in our report.

So we attempted to classify the willful evaders, and those who showed utter disregard for the law; the conscientious objectors, who were willful violators and convictions under the Selective Service Act, and other types of violators. These were the basic classification, Mr. Chairman.

And then there was another group, I mentioned in the opening, who had received Presidential pardons under the Presidential proclamation of December 24, 1945, totaling 618; and those who entered the Armed Forces and qualified for the pardon of that proclamation totaled 1,518.

Senator KENNEDY. In the conscientious objector area, as I understand, you did grant amnesty for conscientious objectors.

Is that correct?

Mr. O'NEIL. That's correct; because we found there had been some errors made in failing to recognize that they came under the purview of the law.

In other words, there were the errors that did occur in the Selective Service Boards in making their classifications.

Senator KENNEDY. Is it only for those errors in the administration of the law, and for those that had conscientious objections based on religion, or did you not grant some conscientious objection for other than religious grounds?

Mr. O'NEIL. Yes, there were, when they could show that there had been a sustained, sincere objection to participation in any way, in war per se, as distinct from selecting a war.

Senator KENNEDY. Well, the Supreme Court finally caught up to you in 1970 on that.

Mr. O'NEIL. Well, I don't know as they caught up to us, but they caught up to the law, probably, Mr. Chairman, and changed the law, and we recognize that that change is in existence now, and any machinery that is set up would have to consider that, of course.

Senator KENNEDY. I think that you showed in that area a remarkable amount of foresight and sensitivity.

Let me ask you now, for a personal viewpoint, as one who has been involved in this issue, and as one who has served the country in this area, what is your own view about amnesty. Do you think that there should be a period for amnesty at some time in the future?

Mr. O'NEIL. Yes. I would say this in answer to the question; to qualify my answer, that now is not the time to do it, I don't believe.

When the conflict has ended, the machinery should be set up. I'm

not advocating an Amnesty Board, but some machinery should be set up, and I think it is fine that this committee is focussing attention on developing the information that could be available for such a machinery operation.

It should be set up to move into this question in order that it could be done expeditiously, and within a reasonable time.

Senator KENNEDY. I believe the type of people that you would be most interested in, and deserving, would be those, that had either serious religious objections to the war, who fell within the criteria of receiving amnesty because of the sincerity of their beliefs about the war.

I suppose in considering the postwar period in Vietnam that category might be a lot larger, given the general view of many young people in this country about the war.

Mr. O'NEIL. I think that is so, but I think that that should be restricted to the examination of the record, and it would come out very forcibly if it is done well, as was done with the trained reviewers who did it for us after World War II.

Senator KENNEDY. What criteria did you use in this area? It seems that you had very broad latitude in using your own judgment.

How could you determine whether the sincerity and the persuasiveness of an individual justified amnesty?

Mr. O'NEIL. I would say there that we relied pretty much on the development of the material from the reviewers.

Now, the material that was made available to us was the family history, the school records, the Selective Service records, the prosecution records, the court records, the probation office records, and in most instances the psychiatric reports plus the appearance before us of the individuals themselves to plead their cases, or through their attorneys.

And this became the basis of our decision, and you have to look at it in a broad sense when you consider that; and rely on their views, whether they are in writing or in a personal appearance.

Senator KENNEDY. May I ask this: how did you decide on the Board? Was it a majority rule, say, two people thought the fellow was sincere, and one fellow thought he was a faker?

Say one fellow felt very strongly about his sincerity, and the other two really didn't know? What kind of guidance can you give us about trying to set some standards?

Mr. O'NEIL. In answer to that question, I would say this, that when we ran into a situation like that, we had long discussions about it; but I don't recall any decision that was based on any vote of 2 to 1, on any individual case. There were discussions in which we might have opposite views, but before we finished with it, they were reconciled.

Largely, I would say in that area, Justice Roberts played the dominant part because of his judicial position, number one, and his experience; and plus his background.

Senator HART. I appreciate your testimony, and I'm sorry I missed some of it.

Senator KENNEDY. Thank you very much, we appreciate very much your coming.

Mr. O'NEIL. I welcome the opportunity to be of such service as I can.

Senator KENNEDY. General Benade.

General Benade is the Deputy Assistant Secretary of Defense, and we appreciate very much your being here.

STATEMENT OF MAJOR GENERAL LEO BENADE, DEFENSE DEPARTMENT ASSISTANT SECRETARY

General BENADE. Thank you, Mr. Chairman, and members of the committee. I appreciate the opportunity to appear before you as a representative of the Department of Defense, to address the subject of amnesty.

Chairman Kennedy's letter of February 7, 1972, requested us to focus on four aspects of this subject: one, the impact of amnesty on the Armed Forces; two, whether deserters should be treated differently from draft evaders; three, the impact on military justice of granting conditional or unconditional amnesty; and four, the timing of any amnesty.

My remarks concern the question of amnesty for deserters from the Armed Forces. The issue of draft evaders lies principally within the purviews of the Department of Justice and the Selective Service System and we defer to those agencies in that regard.

It might be helpful to begin by defining amnesty and briefly reviewing the application of amnesty to military deserters throughout our history.

Amnesty implies a sovereign act of forgiveness for past misconduct, granted by a government to all or to certain persons, and often conditioned upon the performance of a certain act or certain acts within a prescribed time.

The concepts of pardon and amnesty are often interchanged. Pardon releases a person, not from guilt but from the penalty imposed for a legal transgression. Amnesty usually releases a group of persons from certain penalties.

Pardon may be granted to any kind of offender and is usually given after punishment for the crime has begun. Amnesty is usually granted to political offenders, often before a trial or punishment has begun.

Amnesty may be general or particular, that is, it may cover all classed of offenders or be limited to certain groups. It may be conditional or unconditional.

Recognizing that the power to grant amnesty rests with both the legislative and executive branches of our Government, all amnesties in our history have in practice been proclaimed by the President. His power is derived from the constitutional provision that "The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This authority was used for the first time with regard to deserters in 1807 when President Thomas Jefferson granted full pardons to individuals who had deserted from the Army during the 1795 Whiskey Rebellion if they surrendered themselves within a period of 4 months.

Through the years there have been other Presidential proclamations issued, generally after a war, which granted pardons to deserters. However, certain stipulations or conditions were prescribed, such as (1) deserters in confinement were to be released and returned to duty, (2) deserters-at-large, and under sentence of death, were to be discharged and never again enlisted in the service of the country, (3) deserters who returned were to forfeit all pay and allowances during their time of absence, (4) deserters who returned were to make up time lost by their absence and complete their terms of military obligation, and (5) deserters had to surrender themselves within a specified time after the proclamation.

The last amnesty for military deserters was granted in 1924 by President Calvin Coolidge. This Proclamation was prompted as a result of a law enacted by Congress in 1912 which provided that deserters from the Armed Forces would forfeit their citizenship. Although the 1924 proclamation is often believed to be a general amnesty granted to deserters, it only applied to those individuals who had deserted after the Armistice of World War I, and only restored their right to citizenship which had been forfeited upon their conviction. Approximately 100 men were affected by the proclamation.

There has been no general amnesty granted to individuals who deserted during World War II, the Korean conflict or the Vietnam conflict.

More recently, on January 2, 1972, President Nixon expressed his views on this subject. Essentially, the President stated that he would be very liberal with regard to amnesty, but not while American servicemen were fighting in Vietnam, nor while prisoners of war were being held by North Vietnam. After these circumstances were met, he would consider amnesty, but on the basis that these persons would pay the price that anyone should pay for violating the law.

On February 3, 1972, Secretary Laird substantially repeated the President's views.

Within these historical and current policy considerations, I shall now try to answer your four questions.

It is the position of the Department of Defense that the granting of any amnesty to deserters at this time, whether general or particular, or whether conditional or unconditional, would have a serious, detrimental impact on our Armed Forces.

Currently, there are about 30,000 deserters from the military services. Included among these 30,000 deserters are 2,323 men who have deserted to foreign countries. Undoubtedly, there are several thousands of men who are draft evaders. In addition, many men have been prosecuted within the past several years for desertion or draft evasion. Some have completed their sentences or been otherwise released. Others are still imprisoned or under court jurisdiction. Despite the many individual lives these substantial figures represent, there have also been millions of young men and women who have served in the Armed Forces in recent years, many of whom have served in Vietnam. Many Vietnam veterans are still serving in our Armed Forces. Some servicemen, no doubt, served reluctantly, but the vast majority of servicemen and women—over 95 percent—

served honorably and were discharged under honorable conditions. We must also recognize the thousands of men who died in Vietnam, those who are being held captive or are missing, and their families and friends. A grant of amnesty would be unfair and inequitable to these millions of Americans who have been and are affected most directly by our efforts in Vietnam.

Senator KENNEDY. Could I ask you, General: I don't know whether you heard, earlier, a very splendid and moving testimony of the Ransoms on this very point; I would be interested in what your reaction would be to that.

General BENADE. I was very touched and moved by their testimony. I appreciate the point that they made, and speaking to you as an individual, Mr. Chairman, and not in an official capacity, to me the great problem has been the difficulty of generalizing about this subject.

I am sure that if you have not already had, you perhaps will have before the committee, parents of other young men who have died in combat, and who would express a view directly opposite of that expressed by Mr. and Mrs. Ransom.

Sitting in the audience, Mr. Chairman, the impression I derived was how terribly complex this problem is, and the fact that it is possible to make a very persuasive and moving argument on either side of the issue.

Senator KENNEDY. That's a little comment we had written down here.

But I'm interested in your comment, because you have the responsibility in this area. And I welcome this.

General BENADE. I do want to make clear, though, Mr. Chairman, that I believe without any reservation in that consideration of this problem should be deferred until after conclusion of the war. To that extent, I would agree with Mr. and Mrs. Ransom. I understood their testimony to be to that effect.

The Department of Defense considers it to be in the national interest to encourage the return of all deserters to military control, especially those in foreign countries. Experience indicates that a substantial number of deserters have chosen, on their own initiative, to surrender themselves and face the full implications of their actions.

Extending amnesty to military deserters would probably influence some of these men to return to military control. However, amnesty is a delicate tool which must be used with great care and discretion to be certain that it does not adversely affect discipline which is so vital to an effective military force.

Senator KENNEDY. Let me ask you, what do you do now, for a young person who has deserted and wants to come back?

General BENADE. We encourage their return to military service, and each case is handled on an individual basis.

Senator KENNEDY. But they don't have really any idea before coming back as to what's going to happen to them, would they?

General BENADE. No, sir; they would not.

However, we believe they should have confidence in the integrity of the military court-martial system, as well as our administrative

system. Of those who have returned, some were handled by courts-martial and others were handled by administrative discharges. Still others were returned to duty, because the circumstances can vary so greatly.

To take just a moment, Mr. Chairman, I think it is important to place military deserters in proper perspective. They can and do run the whole gamut. There seems to be a connotation that a deserter in the military service is one who is seeking to avoid service in Vietnam. That of course is not necessarily true.

There are cases of men who are presently deserters, who served, and served very well in Vietnam. Their desertion thereafter is for reasons entirely unrelated to the problems of Vietnam. So, there shouldn't be an automatic construction upon this, that all of these men are seeking to avoid hazardous duty in Vietnam.

Senator KENNEDY. That's a very useful point.

General BENADE. Now, to elaborate, when a man comes back into military control, the commander is charged with examining and considering the whole background of the man's service, up to that point. If the man, for example, has rendered honorable service prior to that time, and has had no prior infractions of any kind and has served in Vietnam, and served honorably, and it turns out upon investigation that the reason for his desertion was a personal, family affair, or a girl friend, or financial difficulty or whatever, there is no reason to throw the book at him, so to speak, under those circumstances. Many of the commanders will not.

And then there are other cases where it is an aggravated culmination of a long series of offenses. So there is a whole range in there as to why these men desert.

And it's very difficult, Mr. Chairman, to generalize about it.

Senator KENNEDY. Have you tried to put these in categories, so that we know how many of the 30,000 are because of the war, or other kinds of offenses?

General BENADE. We have some limited data, Mr. Chairman. I wish we could be more helpful in that regard.

I do have some figures which we will give you which will be of help to the committee, an analysis of the profile of the men who desert.

There is a great similarity in the patterns in many of the cases. One thing that might be useful, Mr. Chairman, is to realize that of those who have deserted to other countries, the 2,000 some odd that I have mentioned, I am recalling some 600 cases. To the extent that we have been able to determine by individual research, it indicates that less than 4.1 percent were motivated by anti-Vietnam or political protest, and this percentage has varied only a few tenths of a percent over the last 4 years.

In other words, in the great majority of the cases, the reasons for the desertion were other than Vietnam protest.

Senator KENNEDY. Could I get that again? Approximately 4 percent of those who desert, desert because of—

General BENADE. An analysis of the data maintained on deserters who have gone or have attempted to go to foreign countries indicates that less than 4.1 percent were motivated by anti-Vietnam or

political protest: and this percentage has varied only a few tenths of a percent within the last 4 years.

Senator KENNEDY. That statistic would suggest that really there is a relatively small percent of deserters that have done so because of their sincere belief about the morality of the war in Vietnam.

General BENADE. That is based on the best evidence that we have, Mr. Chairman.

May I take just a moment to show you what the reasons for absence are in most of the cases? Personal and family problems, financial problems, inability to adjust to the military environment, and lack of respect for authority; irresponsibility, and we define that as a lack of self-discipline and self-confidence, and poor judgment; romantic entanglement, and antimilitary protest.

Now this, I should explain, Mr. Chairman, is a little bit different. The antimilitary protest here involves the individual who indicates that he hasn't any specific goals in civilian life. He entered the military to see if service life was what he thought it was, and later decided it wasn't.

Another reason, attempt to escape punishment for previous offenses. Other reasons: supervisor indifference and lack of sensitivity by officers and noncommissioned officers to the individual's problems. This is through the eyes of the man.

In the case of aliens, return to their country of origin, home and family ties; and the last reason, anti-Vietnam or political protest.

Senator KENNEDY. To the extent that you can give us as much information as possible in those areas, it would be very useful to us.

General BENADE. We would be glad to, Mr. Chairman, and with your permission we can work with the committee's staff and counsel, and we would be glad to furnish any and all data that we have on this subject.

(See app. 2 below.)

General BENADE. If I might conclude, Mr. Chairman, I have just a brief part of my statement remaining.

With amnesty at this time, some military members might be influenced to desert the service, safe in the knowledge that punishment or continued military service would be avoided. The unreliability and unpredictability that such a situation presents could seriously jeopardize our national interests and our national security.

Senator KENNEDY. Just on this point, General, what does this suggest about the reality of the Army at the present time?

I don't think there's a young person in the country who would want to be known as a deserter, even if given the possibility of amnesty. I don't think there are many of those. I think that's an extraordinary burden to carry, to be a deserter, even though you'd be granted amnesty.

And the suggestion that if you granted it at the present time, that there would be wholesale numbers of people who would be willing to take that as a route out and branded as a deserter, says a good deal about morale in the Army.

General BENADE. I agree, Mr. Chairman. I would like to perhaps clarify this slightly. I think we must keep in mind that the Armed Forces consists of almost 2½ million men and women, many of

whom entered the service as a result of draft pressures, or were draft motivated, even in their enlistment.

I think we would have to agree that large numbers of them would rather be someplace else. Our principal concern, and it is not something we can quantify, Mr. Chairman, it is a value judgment—but, if amnesty were to be granted while the war is still going on, I think it is only natural that many young men who enter the service under duress, if you will, of the Selective Service, would see that amnesty were granted for those who desert and it would be human and understandable that they would feel, well, there is no penalty attached, then the stigma can't be so bad.

I would like to think that they would still be a relatively small part of our force, but it could still be significant to us.

Senator KENNEDY. Let me ask this, General.

Since you're moving toward the volunteer army, let's take the next point of departure which would be considering amnesty at the time that they draft the last American.

Doesn't your argument fail a bit then? I agree with you about the draft motivation, but once you eliminate that and move to a volunteer army, which is the objective of the administration—

General BENADE. I think the problem would be diminished with an all volunteer army, but I think the principal factor that would make this problem diminish would be the cessation of hostilities in Vietnam, more than the all volunteer aspect.

Your second question asks whether deserters should be considered differently from draft evaders. If amnesty is to be extended to any individuals, we believe a distinction should be made between draft evaders and deserters.

The draft evader's absence has an indirect impact on the Armed Forces. His absence requires that his military obligations be borne by another citizen. The deserter's absence has a direct impact on the Armed Forces, and under certain circumstances such as combat, perhaps a critical impact.

While the draft evader's absence involves an avoidance of his civic responsibilities and a violation of the law, the deserter by his absence not only avoids his military obligations, he also violates the oath he took upon entry into military service, and he violates military law. If military obligations, oaths and laws, are to have any continued meaning and effect, they must not be rendered inoperative by any untimely extension of amnesty.

You also ask for the impact on military justice of any conditional or unconditional amnesty. If any amnesty were granted, the number of desertion cases presently in our military justice system undoubtedly would be reduced. However, I can say with assurance that our justice system has been, and will continue to be, able to process all deserter cases in a fair and expeditious manner.

Finally, you ask about the timing of any amnesty. As I have stated earlier, any grant of amnesty at this time would have a most serious adverse impact on our Armed Forces. We think it is wise that consideration of any amnesty for deserters be deferred until some future time when the requirements of Vietnam have passed.

Gentlemen, that concludes my statement. I will be glad to try to answer any questions you may have.

Senator KENNEDY. Just in that last paragraph—is there anything wrong in considering now a later grant of amnesty?

General BENADE. No, sir; I'm heartily in favor of this subcommittee's exploring this complex problem, and I agree it should be looked at in advance.

Senator KENNEDY. General, can you come back this afternoon? I just had one area I wanted to explore.

Senator HART. I just have one question.

The profile that you gave us shows that between 4 percent and 5 percent of the deserters overseas as being politically motivated—what percentage of the total deserters are reflected by the men overseas?

General BENADE. First I would like to clarify, if I may, Senator Hart, that that number indicates those who have deserted to other countries. These are the 2,000 plus, who have gone to Sweden, Canada, Mexico.

Now, the total at-large figure, sir, is 29,892, and that includes the figures I have just given you.

These are men who have been absent for varying periods of time.

Senator HART. Maybe we'll have to ask you to come back.

Senator KENNEDY. We have a vote now, and we're going to have another in 45 minutes, so can we do it at 2:30?

(Whereupon, at 1 p.m., the subcommittee recessed, to reconvene at 2:30 p.m. the same day.)

AFTERNOON SESSION

Senator KENNEDY. The subcommittee will come to order.

General, you used the figure of 4 percent for men who deserted because of Vietnam, and as I indicated this morning, that sounds unbelievably low.

Isn't that figure really on the basis of some six or so hundred of those who actually returned?

General BENADE. Yes, Mr. Chairman, I would like to clarify that. I would like to make it clear that of those who have deserted to another country—and I'm referring to the period of 1 July 1966 through 1 January 1972—there were a total of 3,293 of those individuals. Now, of those individuals, 944 have returned to military control; 17 have been discharged in absentia, and nine have died in a foreign country.

Now, of those who returned to military control, an analysis was made of 640 of them. Of the 640, only 4.1 percent gave as their reason for deserting an anti-Vietnam war belief.

Senator KENNEDY. Because that is quite a bit different than making the generalization in terms of the number of people who actually deserted because of the Vietnam war because I would think that those who deserted because of the war would be, you know, the last to come back, I would expect. It seems that if their reasons for returning would be that they desert the war for that reason, that there would be a much much greater reluctance as the war continued for them to come back, rather than those who have taken the jeep out of the motor pool.

General BENADE. It is possible, Mr. Chairman. I have no way of verifying that.

Senator KENNEDY. You also said, 2,323 who deserted are abroad. Isn't it true that all you're really saying is that you have the addresses abroad for that number and that a substantial number of the other 27,000 could also be in foreign countries.

General BENADE. It is possible, Mr. Chairman.

The 2,323 that I referred to are those that have been identified as being in foreign countries. It is possible that there are others who have not been identified.

Senator KENNEDY. Do you make any kind of an evaluation as to those who had the Vietnam war as a sort of a secondary reason for or secondary cause for desertion?

General BENADE. I believe that it is, Mr. Chairman, and I would like to amplify on that a little bit.

I have before me—and I would be very happy to submit it for inclusion in the record—a typical absentee-deserter profile. Very briefly, it indicates that the typical absentee-deserter profile for the Army is 21 years of age grade or rank is E-4 or below, they are single, non-high school graduate. He averages about 20 months in service.

For the Navy, he is essentially the same. His average age is 21 to 22. His pay grade is E-3 or below, single, non-high school graduate, and usually in his first enlistment.

For the Marine Corps, average age is 19 or 20, rank is E-4 or below. Marital status, single. Educational level, nonhigh school graduate. He averages about 10 to 11 years of schooling, and time in service averaged 12 to 18 months.

In the Air Force, age runs just a little bit higher, 20 to 22, with the pay grade E-4 or below. Marital status, single, educational level is a high school graduate. Time in service is 24 months or less.

Now, as I indicated this morning, Mr. Chairman, there are certain didn't submit to induction and fled the country. It is a rather different profile, the characteristics that have been associated with them are immaturity with a history of previous personal failures, the product of an unstable home, either a broken home or a home plagued by some type of social-psychological maladjustment. Another finding, the individuals have a low frustration threshold.

Fourth: Is a repeat AWOL offender and a history, one out of three, of disciplinary and administrative action.

Senator KENNEDY. That would certainly indicate that those who are involved in the desertions are rather different from those who didn't submit to induction and fled the country. It is a rather different profile, as I understand, for those two different classes of individuals.

As I understand, the deserters, primarily, are of a lower economic, education, and perhaps social level than the other group. They might be slower in realizing or recognizing, perhaps, a higher responsibility to conscience than those who have been more fortunate in terms of either education or religious connection.

Just very briefly, now, on page 6, you talked about differentiating the evader from the deserter, and you mentioned that if military obligations and laws are to have any continued meaning, they must not be rendered inoperative by an untimely extension of the amnesty.

You say that the deserter who violates not only avoids his military, he also violates the oath he took in military service. Why is the military law any more important than civil law?

General BEXADE. I think they are both important, Mr. Chairman. I think the added significance of the violation of military law is that once the individual enters the Armed Forces and takes the oath, he thereby subjects himself or is subjected to the Uniform Code of Military Justice, still being responsible under civil and criminal laws. The importance of desertion in the Armed Forces, Mr. Chairman, would be difficult to exaggerate. We are only authorized certain strength levels, and when men desert or are otherwise absent without leave, that can have a serious effect on the operation or effectiveness of their units.

Obviously, a unit that is in a combat zone is in a different position, and the presence of every man at his duty station is more vital to the unit than perhaps a unit, say, in the United States.

But there is a direct correlation, Mr. Chairman, between the operating capability of a unit, particularly the smaller units, and the presence for duty of the assigned complement. It is for that reason, that traditionally in our military history, the man who deserts his unit in combat or who absents himself in the face of the enemy has always been treated much more severely than the man who deserts under other circumstances, or absents himself under other circumstances.

Senator KENNEDY. That is more understandable. I think, than someone who deserted in this country, particularly given the sort of profile which you have raised here in terms of those that are actually deserting.

(General, you have been very kind and terribly patient with us today.

I'd like to just submit some written questions to you, and I want to thank you very much for our being here.

(See app. 2 below.)

Senator KENNEDY. Our next witness is Kevin T. Maroney, Deputy Assistant Attorney General, Internal Security Division of the Department of Justice, is here in place of Mr. Mardian.

Mr. Maroney. I understand, has been in the Justice Department for some 20 years, and I assume Mr. Maroney will be using a letter we have received from Mr. Mardian as the text.

And perhaps you can summarize briefly the Department's position, and then we will ask some questions.

STATEMENT OF KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY JOHN H. DAVITT, CHIEF OF THE CRIMINAL SECTION, INTERNAL SECURITY DIVISION; AND ROBERT W. VAYDA, ATTORNEY, SELECTIVE SERVICE UNIT, DEPARTMENT OF JUSTICE

Mr. MARONEY. Mr. Chairman, I am pleased to appear here today on behalf of the Department of Justice, in response to the committee's request of February 10, 1972.

I am accompanied here today by Mr. John Davitt on my right, Chief of the Criminal Section of our Division, which has the immediate supervisory responsibility of the handling of selective service matters. I am also accompanied on my left by Mr. Robert W. Vayda, an attorney in our Selective Service Unit.

In your letter, Mr. Chairman, you requested testimony from the Department on the Policy considerations in granting amnesty, particularly as it affects pardon and paroles. You also requested that the Department provide the subcommittee with data on the numbers of individuals believed to be in exile abroad, the number of individuals avoiding prosecution for selective service violations in the United States, the numbers of complaints now pending, and the recent experience of the Department in the prosecution of selective service law violators.

The Internal Security Division responded to your letter under date of February 23, 1972, and if the Chair will permit, I propose to use the body of that statement as the basis for a formal opening today.

I shall endeavor to answer in order the specific inquiries which were raised in the chairman's letter of February 10th.

First, with respect to clemency. Any provision for clemency at this time would be in contravention of the executive policy recently enunciated by President Nixon on two specific occasions. The President clearly rejected any consideration of amnesty at this time, while hostilities continue and American soldiers remain as prisoners of war in North Vietnam.

Historically, a grant of amnesty to males who have refused to serve their country during a period of time when the country was engaged in actual hostilities, is without precedent. The President's policy is in consonance with the acts of past presidents. Only twice in our history has a President accorded clemency to persons who refused to comply with the draft laws and serve their country. On both occasions clemency was granted only after cessation of hostilities, and it was granted only to those draft resisters who had been convicted for their offenses. In 1933, President Franklin D. Roosevelt granted pardons and restored citizenship to about 1,500 persons who had been convicted of violating the draft and espionage acts during World War I. In 1947, President Harry S. Truman granted pardons which restored civil and political rights to 1,523 individuals who had been convicted of draft evasion and sentenced under the Selective Service Act during World War II.

With respect to the question of parole, it should be observed that in situations where an individual has been convicted of refusing induction or performance of civilian work as a conscientious objector and has been remanded to the custody of the Attorney General, he has the right under existing selective service regulations to apply for release from such custody on parole for service in the Armed Forces or to perform alternative civilian work. Although the present regulations contain no provision for the pardoning of such paroled individuals who served in the Armed Forces or performed alternative civilian work, nevertheless, the right to seek a Presidential pardon is, of course, available to them.

Next, our information indicates that as of February 14, 1972, there were 4,201 fugitives against whom Federal arrest warrants were outstanding based on indictments filed as well as criminal complaints issued for selective service law violations. Of this number, approximately 2,300 are believed to be in Canada; and approximately 460 are thought to be residing in various other foreign countries. Thus, the balance of approximately 1,441 defendants, whose whereabouts are unknown, are believed to be living in the United States.

As of the end of January 1972, there was a nationwide total of 6,091 defendants against whom indictments were pending and 12,333 pending cases reported by the Selective Service System to U.S. attorneys for violations of the selective service law. These pending cases are awaiting completion of FBI investigations and processing by the U.S. attorneys to determine whether the facts warrant presentation to the grand jury for indictment. Based upon our experience during the past year, it is expected that about 80 percent of these cases will be dismissed without prosecution, because the completed investigations will likely reveal that the delinquencies were incurred inadvertently and subsequently corrected, that there were valid excuses for apparent delinquencies, or that the registrants will rectify their delinquencies, e.g., by reporting for induction.

Three, our recent experience in the prosecution of selective service law violators shows that on the average, about 40 percent of registrants ordered to report for induction fail initially to comply with the orders. However, approximately 80 percent of these registrants eventually comply with selective service requirements and thus remove their delinquencies. The remaining 20 percent, following completion of an FBI investigation, are indicted: and a substantial percentage of these are allowed to purge their violations by consenting to induction. Their indictments are then dismissed.

There is contained in the letter, page 4, a table listing the new indictments filed in selective service cases, and a breakdown of the cases terminated for the preceeding 6 or 7 month period.

As earlier noted, the substantial number of dismissals of indictments is due primarily to the fact that a great number of indicted draft delinquents choose to submit to induction or enlistment rather than stand trial. In this regard, the Department of Justice has, as a matter of policy, declined prosecution, where, in the absence of aggravating circumstances, draft resisters display a change of heart and belatedly submit to induction, or where conscientious objectors submit to an order to perform alternative civilian work.

It should also be pointed out that the number of draft violators who have experienced a change of heart and elected to submit to induction or alternative civilian work has increased significantly in the past several months. During the past 5 months 728 indictments were dismissed because indicted registrants voluntarily submitted to induction. As a matter of fact, that figure is 1,200 such indictments being dismissed since last March.

The recent acceleration in the trial and termination of selective service cases was undertaken primarily to assure the defendants of their constitutional rights to a speedy trial. In addition, this acceler-

ated activity is intended to effect a more faithful compliance with the mandate of Congress, incorporated into the act itself, requiring the Attorney General to give priority to the trial of Selective Service charges.

That concludes our formal statement, Mr. Chairman. At this point we would be glad to answer any questions you may have.

Senator KENNEDY. Could you tell me why, up until last year, all of these cases were handled in the Criminal Division, and now they have been moved to the Internal Security Division of the Justice Department?

What is the significance of that?

Are they some threat to our internal security?

Mr. MARONEY. No, sir: I don't think there is any significance in that transfer. We did have a change, as you know, in the administration of the Division just a couple months prior to that time. I think part of the purpose was to give the Division additional responsibilities. This was one of the additional responsibilities which were selected by the Attorney General, and in addition to the Selective Service violations and other important additional functions which were conferred on the Division about that same time, was a special responsibility in an area which we refer to as special litigation cases, which gives the Division the responsibility of prosecuting for various offenses involving violations of the Explosives Act.

Senator KENNEDY. Well, it does not seem to be linked solely on to the violators of the Explosives Act. It seems surprising to me to take people who have declined to involve themselves because they questioned the morality of the war and tuck them into the Internal Security Division of the Justice Department.

Now, you are well aware of the changes by the courts in the Selective Service System, most specifically in the Welsh case. There have been a number of young people who have either been indicted or imprisoned prior to the Welsh case, and also because of the delinquency regulations which were later ruled invalid by the Supreme Court.

I'm wondering what, if anything, the Justice Department did for those people who were convicted under these different provisions as far as notifying them of their rights, or attempting to release them or insure that they were freed.

Was anything done by the Justice Department, or did you wait until they initiated individual proceedings of their own?

Mr. MARONEY. You're talking about people who have been convicted and who are serving their sentences?

Senator KENNEDY. Right.

Or indicted, for example.

Mr. MARONEY. As far as pending indictments are concerned, those new legal principles, of course, would be screened at the time the matter came up on pretrial hearings, and where an intervening court decision dictated a different policy from the time when the indictment had been returned, of course, it would be implemented at that time, and if necessary, the indictment dismissed based on the intervening court decision.

As far as persons who were in jail serving a sentence, it normally, I suppose, would fall to their counsel to bring the matter to the

attention of the court in the event that an intervening court decision made their continued incarceration unlawful, or in contravention of the new existing law.

Senator KENNEDY. There wasn't any feeling, either within the Selective Service System or the Justice Department that now that they have been convicted under certain rules of law that had been overturned by the Supreme Court, that they should be appraised of their rights? Many of these young people were poor. Isn't there any kind of responsibility to try to make them aware of what their rights might have been?

Mr. MARONEY. The standard procedure would be, in a situation of that kind, when an intervening decision might well apply to a large number of outstanding indictments, would be for the Department to send out a circular letter to all U.S. attorneys bringing to their attention the new court holding and giving them a policy guideline as to their handling of outstanding cases, and to cause them to bring about a dismissal.

Senator KENNEDY. Can you tell us how many people have been convicted for example, prior to *Welsh*, that would have been released because of that decision because they felt as a matter of moral conscience other than that based upon religion?

Mr. MARONEY. No, sir; I don't believe we have any statistics.

Senator KENNEDY. How about punitive reclassification?

Do you know how many were convicted under punitive reclassification?

Mr. MARONEY. I know there were a number of cases which were dismissed following resolution of that problem.

Senator KENNEDY. Do you know if there are any people now in jail because of punitive reclassification?

Mr. MARONEY. I am unaware of that, Mr. Chairman.

Senator KENNEDY. Would there be any way of finding out?

Could you check that for us and let us know?

I suppose it would be in the defendants' briefs, wouldn't it, of those who are serving in jail now?

Mr. MARONEY. It would also be a question of whether or not the intervening court decisions, such as *Welsh*, were held by the court to be retroactive in application, not necessarily with respect to the *Welsh* decision, but with respect to other decisions along the same line, which sometimes are not made retroactively applicable.

In *Welsh*, I think that decision would apply to any outstanding incarcerations, and any known to the Department would be rectified.

And certainly, the individual defendant involved would, I'm sure, and through his counsel immediately bring to the attention of the U.S. Attorney, the facts which he thought brought his client within the intervening decision.

Senator KENNEDY. That always assumes, and it is often not the case, that these fellows have counsel, that they can afford it, that they have people following these things, as the Department does.

Is that difficult to gather? I mean, can the Department supply for us a list of individuals who have been tried and convicted under the punitive reclassifications?

Can you let us know that?

Mr. MARONEY. We can attempt to ascertain if we can get such statistics, Mr. Chairman, and give them to the committee, and also, if possible, to furnish the committee with statistics on the number of indictments dismissed as a result of *Welsh*.

(See following letter:)

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., March 29, 1972.

HON. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: During my appearance on March 1, 1972 at the hearings conducted by the Subcommittee on Administrative Practice and Procedure into the "Draft Procedures and Administrative Possibilities for Amnesty", you asked me to obtain certain information, if it was available, and furnish it to the Committee.

First, you asked to be advised of the *number* of people who were convicted, for example, prior to the decision in *Welsh v. United States*, 398 U.S. 333, decided June 15, 1970, who would have been released because of that decision. Second, you asked how many individuals were convicted "under punitive reclassification" and if there are any such persons now in jail. Third, you inquired whether any of the individuals who have been convicted (in recent years) under the Selective Service Act have applied for either pardon or commutation of sentence.

With respect to your question regarding the *number* of individuals convicted prior to *Welsh* who would have been released because of this decision, I regret that we have no statistics which would be responsive to this question. This information would not be obtainable, except by a review of the thousands of selective service files, trial transcripts and briefs in the ninety-three offices of the United States Attorneys throughout the country.

I assume, however, that your second question relating to the number of individuals presently incarcerated because of "punitive reclassification", (*Gutknecht v. United States*, 396 U.S. 295, decided January 19, 1970), was motivated, as was perhaps your first question, by the Committee's understandable concern that there may be individuals still in jail who were convicted prior to *Welsh* and *Gutknecht* and whose convictions would not have been sustained had those decisions been rendered by the Supreme Court before their trials. Although, for the reasons I have indicated, we do not have precise statistics concerning this question, the Bureau of Prisons has advised us that the average *time served* in prison by Selective Service Act violators during the period 1968 through January 1970 was 16 months. (All United States Attorneys were directed by this Department on January 30, 1970, four days after the decision in *Bracen v. United States*, 396 U.S. 460, and eleven days after the decision in *Gutknecht*, to dismiss any indictment alleging an offense under the Act which might have resulted from a punitive reclassification). Since twenty-two months have elapsed following the Supreme Court's decision in *Welsh*, and twenty-six months since the decision in *Gutknecht*, I believe it may safely be assumed that any individuals who were convicted prior to these decisions and whose conviction would have been affected by them, are no longer imprisoned.

In reply to your final inquiry as to how many individuals who have been convicted under the Selective Service Act have applied for pardon or commutation, the following information was provided by Mr. Lawrence M. Traylor, the Pardon Attorney:

"Your inquiry concerned persons convicted since 1965 under section 462(a) of Title 50 Appendix, United States Code. We have searched our records and have found only one person who was granted a pardon under these circumstances. He is Edward K. K. Kaohelauii who was convicted on January 31, 1966 and pardoned on December 23, 1971.

"We now have pending *six* applications from persons convicted under 462(a), United States Code 50 Appendix.

"Our eligibility rules require a waiting period of at least three years after a conviction before a person can apply for a pardon. Depending upon our backlog it could take several years after application before a decision is reached."

I hope that the foregoing information is of assistance to the Subcommittee. If I may be of further help, please do not hesitate to contact me.

Sincerely,

KEVIN T. MARONEY,
Deputy Assistant Attorney General,
Internal Security Division.

Senator KENNEDY. Have any of the young people who were convicted under the Selective Service Act applied for either pardon or commutation of sentence?

Can you tell us how many have applied and what action has been taken?

Mr. MARONEY. I don't have those statistics, Mr. Chairman. Of course, that comes within the purview of the pardon attorney. I would be glad to try to get those and submit them to the committee.

Senator KENNEDY. Thank you very much. You've been very patient with us.

The next panel will be the Very Reverend John Wesley Lord, who is a Methodist Bishop of Washington, and the Very Reverend Bernard Flanagan, Roman Catholic Bishop, Diocese of Worcester, Mass., and I am pleased to welcome the panel this afternoon: Bishop John Wesley Lord of the United Methodist Church and Bishop Flanagan of Worcester.

Bishop Flanagan was installed as bishop some 13 years ago by Cardinal Cushing, and he's demonstrated his tremendous concern for social issues and for those who suffer abroad, and he's been enormously concerned about the problems of refugees in Bangladesh, and those that are disadvantaged in all parts of the world, as well as those in our community.

Bishop Lord also has a Massachusetts background. He was installed as bishop in 1948, served in Boston for 12 years. Since then he's been in Washington and has been an outspoken leader on behalf of social justice.

We want to welcome both of you gentlemen here this afternoon, and we apologize for the time of the hearing, but it was unavoidable. We appreciate your interest and presence here.

STATEMENT OF THE VERY REVEREND JOHN WESLEY LORD, METHODIST BISHOP OF WASHINGTON, AND THE VERY REVEREND BERNARD FLANAGAN, ROMAN CATHOLIC BISHOP, DIOCESE OF WORCESTER, MASS.: ACCOMPANIED BY DENNIS FREEMAN, CONSCIENTIOUS OBJECTOR, DRAFT COUNSELOR

Bishop FLANAGAN. Thank you very much, Senator. I am honored by the opportunity to speak before this committee. You have already introduced me, so I think I can omit the first paragraph of my prepared statement, and simply say that I speak here as a pastor concerned about the wounds which this tragic war has inflicted upon our country and its people, particularly upon its youth. In this capacity I am appreciative of the efforts which are being made to explore and come up with an answer to the vexing question of amnesty for those who have gone into exile, are in jail, or are living underground because of a conscientious objection to the Vietnam war.

For your information, I wish to cite statements which have been made by the Catholic Bishops of the United States with reference to conscientious objection, which is the basis on which many of these young people have either gone into prison or exile, and which to my mind is the justifying cause for now granting them amnesty. Let me just cite two or three of these pertinent statements of the bishops, and let me say that while I concur fully in these, that I speak here today not as a representative of the National Conference of Bishops, but as an individual, and as I said at the beginning, as a concerned pastor of souls.

In November 1968, in their pastoral letter, "Human Life in Our Day," the bishops said:

We therefore recommend a modification of the Selective Service Act, making it possible, although not easy, for so-called Selective conscientious objectors to refuse—without fear of imprisonment or loss of citizenship—to serve in wars which they consider unjust, or in branches of the service, (for example, the Strategic Nuclear Forces) which would subject them to the performance of actions contrary to deeply held moral convictions about indiscriminate killing. Some other form of service to the human community should be required of those so exempted.

In October of last year the bishops issued a further declaration on conscientious objection and selective conscientious objection. In this statement they reiterated their stand, particularly with respect to selective conscientious objection, and went on to say:

We are aware that a number of young men have left the country or have been imprisoned because of their opposition to compulsory military conscription. It is possible in some cases that this was done for unworthy motives, but, in general, we must presume sincere objections of conscience, especially on the part of those ready to suffer for their convictions. Since we have a pastoral concern for their welfare, we urge civil officials, in revising the law, to consider granting amnesty to those who have been imprisoned as selective conscientious objectors, and give those who have emigrated an opportunity to return to the country, to show responsibility for their conduct, and to be ready to serve in other ways to show that they are sincere objectors.

And then just last November the bishops again returned to the question of amnesty in a resolution on the larger question of the Southeast Asia conflict. In this they urged that the "civil authorities grant generous pardon of convictions incurred under the Selective Service Act, with the understanding that sincere conscientious objectors should remain open, in principle, to some form of service to the community."

As a bishop who participated in the formulation and release of these statements, I concur in everything which was said. I personally and strongly support the proposal for some form of legislation or Executive order which would grant amnesty to these men and provide alternative service opportunities for them. I would further advocate that this service should not in any way be punitive but rather should be a form of service beneficial both to the individual and to the community. The men who fulfill this honorable service should, I believe, have the same GI benefits as those provided for men who serve in the armed forces. I also want to express concern, from a pastoral point of view, to simply to raise the question, for those men who have received less than an honorable discharge from the military service for various causes, which may have inflicted some injustices upon them.

We must see that the question of amnesty is a crucial and special issue at this time in our national history. As the bishops said in their 1968 pastoral letter which cited:

The war in Vietnam typifies the issues which present and future generations will be less willing to leave entirely to the normal political and bureaucratic processes of national decisionmaking. It is not surprising that those who are most critical, even intemperate in their discussion of war as an instrument of national policy or as a ready means to the settling even of wrongs, are among the young; the burden of killing and dying falls principally on them.

If I were a younger man today, in light of my reflections on the immorality of this war which has gone on now for 10 years and has wreaked havoc beyond all proportionality for good, I believe that I could find myself in the same position in which these young men find themselves today.

Some years ago, President John F. Kennedy wrote, "War will exist until the distant day when the conscientious objector enjoys the same reputation and prestige as the warrior does today."

I believe that what this implies is a wholly new concept of patriotism based on preservation of the planet rather than on national defense. It is a concept which needs very much to be fostered and made acceptable at a point in history when it would seem that the very survival of the planet earth is at stake.

Thank you very much.

Senator KENNEDY. I have some questions, but I would like to hear from Bishop Lord.

Bishop LORD. Thank you very much, Mr. Chairman.

May I present the young gentlemen to my left, Mr. Dennis Freeman. He's a conscientious objector serving 2 years of alternate service, and serving now as draft counselor with the United Methodist Church in the building just across the way.

We're happy to have Dennis sit with me.

I am also grateful, with Bishop Flanagan, to appear on this panel, and to congratulate your committee, Mr. Chairman, on what you're doing and the way in which it is being done.

In any discussion of amnesty as presently understood in our country, it is to be fervently hoped that there will arise a new understanding of the basic liberties and justices provided by our Government to its citizens.

Amnesty is accepted by many, simply to mean a general act of pardon against a government, a kind of forgetting and forgiving of past sinful and illegal acts.

We are now led to believe that many, if not most, of the war objectors now living in other countries would reject amnesty, unconditional or otherwise. These war objectors affirm their patriotism in the decision they have made and the actions they have taken.

By their early awareness and recognition of the wrongness of the Vietnam war, an awareness that many in America have come to share, they have rendered a great service to their country. "To us," writes one war objector, "the crime of not participating in such a war pales beside that which our Government asks us to commit in the name of democratic citizenship." Such objectors may be among America's best.

Repatriation may be the right action, but it must be granted for the right reason. In any event, the granting of amnesty must not be

seen as a pardon or absolution for past sins committed against the U.S. Government. Draft dodgers and deserters in Canada and exiles in Sweden, and those in prison who have left their homes and families and country, have paid too high a price to receive it on those terms.

As churchmen, we believe that government and law are to be respected as servants of God and human beings. We are a nation under God, but governments, no less than individuals, are subject to the judgment of God. Therefore, we recognize the right of individuals to dissent when acting under the constraint of conscience and to disobey unjust laws as not in conformity with the gospel, while showing respect for law by accepting the costs of their disobedience. We assert the duty of churches to support everyone who suffers for cause of conscience and urge governments to seriously consider amnesty for such persons while maintaining respect for those who obey.

Perhaps what we need most is a new understanding of conscience. I heard it discussed this morning that we are loath to discuss what we mean by conscience. Well, let me say this. Conscience is not a simple, but a very complex component of human mentality. It is seldom determined by a rational approach, or merely by a system of belief which we may embrace at a particular point in time.

Nor is it an easy matter to articulate one's conscience, clearly and well. These are the assumptions of the Selective Service System. Conscience is often a mixture of ambivalent feelings, ambiguities and uncertainties, leading on occasion to contradictory statements. We discussed a moment ago the difference between evader and deserter. We have at least one presidential candidate who has changed his mind regarding the war. What conscience shall we consider?

Men in Canada and Sweden still struggle with the "why" of their actions. Conscience is not always a static conclusion of an ideology. Often it is a process. It is the process of discovering that something is wrong, and trying to discover what it is and how it can be rectified.

Conscience is the process of trying to understand how to work for a better world. The process of conscience always requires risk-taking, but such risk-takers for conscience sake, may be the most valuable resource a nation possesses. These are the prophets to whom our sons and daughters will build monuments.

The granting of unconditional amnesty would mean more to the U.S. national life than it would mean to the recipients.

The late Cardinal Cushing, whom I considered a dear and trusted friend during our ministry in the Boston area, in his 1970 Easter sermon suggested this in part, "Would it be too much to suggest that this Easter we * * * call back from over the border and around the world the young men who are called deserters? Perhaps this year we should dramatize this nation of beginning, of newness, by doing something unprecedented in our life as a nation."

The strongest moral argument for granting unconditional repatriation, must therefore rest upon the wisdom and willingness of our Government to support conscience as a process as well as certitude in the life of an individual citizen.

It will be a sorry day for our Nation when conscience no longer gives a sign, and when custom tolerates what conscience condemns. These war resisters have much to say to us as a people and we will be impoverished as a nation if we refuse to listen and insist only upon punitive action. Surely one major purpose of amnesty is to heal wounds and divisions in war, but it is also to restore confidence in government on the part of those who have been alienated by the war.

There has been a loss of faith in the Government of the United States, indeed in the conscience of our Nation, by thousands of Americans. An act of amnesty now would go a long way toward restoration of faith of young Americans in their government.

Our great battle, as our President has said, is to bring our country together, to restore peace that comes "with healing in its wings." We trust that we have not witnessed a permanent exodus from our country but that these exiles will return to their homeland. We need them to do battle here for the things they think are right, to help restore sanity and righteousness to our Nation, to continue to be the factor in human life that is provocative of noble discontent.

I support a true amnesty, unconditional and properly understood, for all our war resisters in Canada and those in exile in Sweden.

And could I just add this word, lest it be forgotten. I, too, speak as an individual, speaking from my own conscience and representing only those of my fellowship who care to stand with me.

SENATOR KENNEDY. Thank you very much. Those were two excellent statements.

Bishop Lord, are you in favor of unconditional amnesty? Are you for that now or at the end of the war?

Bishop LORD. I am for it now, Mr. Chairman.

I would hope the two might come together.

SENATOR KENNEDY. Part of the problem, as I see it, is if you continue with the Selective Service System. The administration is headed in the direction of ending the draft as I understand, but as long as you have the draft, unconditional amnesty would confront you with the situation where a young person is drafted and goes over to Canada, and in effect picks up his unconditional amnesty and comes on back, and therefore is not required to serve.

Now, there are many of those that had deep beliefs about the inappropriateness of the draft. I myself favored and supported the draft last time. My concern is that otherwise you would end up with poor men fighting rich men's wars. In other words, in the last Selective Service bill there was a \$3,000 bonus for anyone who would volunteer for a combat division. And, in effect, I thought you were bribing people and taking advantage of them.

And if you look through the period of the statistics in July and August when we didn't have a draft, the percent of nonhigh school graduates increased substantially. Those that were in the lower quadrile in terms of mental ability increased significantly, as well. So, I was very much distressed by it.

So, one of the questions, and as I read in Newsweek magazine yesterday, 7 percent of the people favor your position. I'm sure you've stood against the wind many times in the past, as Bishop Flanagan has.

Bishop LORR. I feel very comfortable with that percentage, Mr. Chairman.

Senator KENNEDY. But certainly what we're trying to do in the course of these hearings is to present as best we can the different views to the Senate, to this committee and to the American people so we can begin to have serious contemplation of this whole issue. This is why your comments are so important and valuable.

Let me ask, having heard earlier witnesses from the Justice Department and the Defense Department who challenged the concept of amnesty. I would like both of you to respond to this issue of permitting an individual to determine which laws he will disobey.

How do you react to that?

If we contemplate unconditional amnesty, for the purposes of argument, at the end of hostilities, how do you relate the individual determination to disobey the selective service law to other laws that they are outraged by, too?

Should we grant amnesty to those as well? If so, then what happens to this society of laws? Also where do divine law and natural law fit into the structure?

Bishop FLANNAGAN. I might reply first by saying that I think we have to admit that there is a very difficult and very vexing problem that is involved here.

I would have to answer it in this way by simply saying that in the ultimate, a man's conscience has to be the criterion by which he makes his moral judgments. He is obligated, of course, to form that conscience on the basis of reflection, consideration of all the various viewpoints, the issues involved, but when he does come to that decision, even though it might be against the civil law at the time, then it seems to be that we as Christians—and I'm speaking now of the Gospel—must accept his decision as one which is correct for him.

But, I do say that it can involve a great deal of very vexing problems for those who are involved with the Armed Forces.

Bishop LORR. I listened to the arguments this morning, because this was a critical point that you put to several of those who have been witnesses here. We in the church know that without law and order we would have a society of chaos, and we could not have that. But, we also know that the only way we get good laws or better laws is in determining what laws no longer serve a good and useful purpose, and must be changed, and the only way to change some of those laws is to stand in defiance of those laws, taking the penalty that such disobedience requires at the moment, but with the hope that new laws will become a part of the government.

After all, many of the laws that we now operate under were not in effect 100 years ago. Law is constantly in the process of change, and without this priceless ingredient of conscience and the determination to examine law, to reexamine it, to find out why it is, we would be unable to establish a new and more satisfactory code.

Think of how we have changed in the history of this country in the last decade, in the last two decades. The only justification for disobedience is that it is the road to better law than we now have, and to think that law is unchangeable would be a kind of heresy because laws must change. Laws are the product of human minds and efforts

and struggle, and just as conscience is a process, so I think the laws of the land must be in a constant process of renewal.

And sometimes this is brought about by those who are willing to disobey what they consider to be poor law in order that better law might be written.

Senator KENNEDY. Wouldn't it be fair to carry on your responses to an additional point, and that is in terms of meeting our responsibilities to this generation.

Do we have to have a law that is going to make a decision about who is right about Vietnam? Do we have to make a decision that says that those that fought were right and those that left were wrong, or that those that left were right and those who fought were wrong?

Isn't it just enough under the general heading of reconciliation to implore the kind of general unconditional amnesty which both of you have referred to?

Bishop LORD. I was rather shocked this morning as I listened to the testimony of the gentleman, the only surviving member of President Truman's Board, when he told us that three men made those decisions, and that all had been made unanimously one way or the other, and we were led to believe that perhaps Chief Justice Roberts was the man who made the ultimate decision. That was almost making of the justice a god, was it not?

It was rather frightening to believe that it was done that way. We are not a perfect society. Granted some of them might get through, and would not get what they deserve. I would rather that that happen than that we set up a board of three men, one of whom is the deciding factor I could see greater error in that the error that might come by granting amnesty to some of those we would say are undeserving.

Senator KENNEDY. Bishop Flanagan, you and other bishops went on record concerning Selective CO's at a time when certainly this country wasn't prepared, and probably still isn't prepared to consider it.

Senator Hart mentioned his amendment to the Selective Service Act for Selective CO's, that there were only 12 votes in favor. I happened to be one of the 12.

But even at the time, when the Bishops' Conference was stressing the importance of it; you felt that there ought to be additional service involved that would not be considered punitive?

Would this be prior to the end of hostilities?

Bishop FLANAGAN. Tactically, Senator, I believe that I perhaps differ somewhat from Bishop Lord.

It seems to me that amnesty almost inevitably has to be tied in to revision, or abrogation of, the Selective Service Act; were we still drafting men under this present Act, and granting amnesty at the same time, I can see possible chaos resulting.

Also, time tablewise, it would again seem to be necessary that it be implemented in the aftermath of Vietnam, rather than at a time when the hostilities still continue.

Like Bishop Lord, I would like to see it come soon; but I face up to the realities, the practical problem, that I see involved there.

He mentioned service, and I don't know whether the bishop and I are completely in accord on that either. I did go along with the Catholic bishops in their statement; I would see some good in requiring opportunities for service. Alternate service would not be punitive, I think, it should be beneficial to these men, be in keeping with their talents, their interests, their desire to improve themselves in some way or another; and beneficial also to the community; not just a make-work job for the sake of making work.

My mind is not closed to the arguments of those who say that this amnesty should be without any condition or qualification of any kind, but at the present moment, I would say that my stance is that I would prefer to see some alternative form of service attached to amnesty.

Senator KENNEDY. At the end of hostilities, or at the end of the Selective Service System.

Bishop FLANAGAN. Yes.

Senator KENNEDY. Thank you very much.

Is there anything you'd like to say, Mr. Freeman?

Mr. FREEMAN. Yes. I do have one point I could raise, and that is, that I was listening this morning to the discussion about the different kinds and different motivations of men who go to Canada, and I would agree with Bishop Lord that as with conscience, as with the reasons, it's a combination, it's a real mix; and I don't really see any way that you can tell, even with a Board, whether more than 50 percent of my reasons for going was this, or whatever.

As an example of this, a good number of draft resisters who have been convicted and sentenced are not necessarily Vietnam war objectors, or principally Vietnam war objectors; but who have resisted because they believe the draft to be illegal and immoral in itself. And it seems to me that if you have a narrow definition of amnesty that incorporates only objectors to the Vietnam war, then you take out this number of people.

I would also conclude by saying that regardless of the motivations for going, most of the deserters, and I would hope that you could get the statistics for this, who have fled the country from the military, would be either draftees or draft-motivated enlistees, and probably would not have been put in the position of having to flee for whatever reason, had it not been for the war and the draft to begin with.

That's all I have.

Senator KENNEDY. That's a very good point.

Thank you very much.

Our next witnesses will appear in a panel: Mr. Joseph Sax, University of Michigan Law School; Mr. Henry Schwartzchild, of the ACLU Amnesty Division; and Dr. Willard Gaylin, professor of psychiatry and law, Columbia University.

Professor Sax has been studying the legal implications of questions of amnesty, and constitutional background. Mr. Schwartzchild is in a special section of ACLU, which is working on model legislation for amnesty, and Dr. Gaylin recently, during a 5-year period, interviewed men in prison for their opposition to Vietnam, who have refused induction.

Again, we apologize to the gentlemen for the lateness of the hour.

STATEMENT OF JOSEPH SAX, UNIVERSITY OF MICHIGAN LAW SCHOOL; HENRY SCHWARZCHILD, DIRECTOR, PROJECT ON AMNESTY, AMERICAN CIVIL LIBERTIES UNION; AND DR. WILLARD GALLIN, PROFESSOR OF PSYCHIATRY AND LAW, COLUMBIA UNIVERSITY

Mr. Sax. Thank you very much.

I have submitted a statement, and will not read from it but would like to speak briefly to several of the issues covered in my statement; and particularly to one question that was raised by you several times today.

This is the question of what happens if we don't enforce the law regularly, and on a full and thoroughgoing basis, all the time.

I hope I can put this problem to rest for you. It is of course a platitude among lawyers that all law enforcement is selective; there simply is no such thing as total law enforcement. Indeed, no society could operate if all the laws were enforced all the time. It is commonly said that if we enforced all of the laws, there would be more people in the jails than outside of the jails.

The purpose of law is to hold the society together. Yet in many instances, rigorous enforcement of the law would rend the society rather than keep its fabric whole. To take a very simple example, it is a commonplace for assaults to be committed in the context of domestic quarrels; or for parents to leave their children unattended momentarily, each of which could violate the law, but it would destroy the family if we did not enforce these laws with some discretion, and some compassion.

Of course, this is something known to every policeman on the beat, as well as to philosophers, and lawyers. I know you've had a fair amount of discussion in the previous days about the Civil War, and some of its problems; and I don't want to reiterate that for you. But I would like to call your attention to a problem from the pre-Civil War period.

This was the question of the Fugitive Slave Act of 1850. As you know, at that time, the Congress passed a law making it a felony punishable by fine and imprisonment to refuse, or fail to aid in the capture of a fugitive slave. This was a law that was widely disobeyed; and we now have enough perspective on that period to say confidently that it was a good thing that the Fugitive Slave Law was not rigorously enforced.

Senator Salmon P. Chase of Ohio said "disobedience to the enactment of the Fugitive Slave Law is obedience to God." The Common Council of Chicago adopted a resolution denouncing the act, and forbidding city policemen to render any assistance in its enforcement. Similiar laws were enacted throughout Ohio, Indiana, Michigan, and Illinois.

In Boston, when a runaway slave was seized and brought before the court, a crowd collected and rescued the prisoner and hurried him through the square. They went off toward Cambridge, the crowd driving along and cheering as they went.

In Syracuse, prominent citizens participated in the rescue of a fugitive slave. Eighteen citizens were indicted, but the sympathy of the community was such that prosecutions were unavailing.

This was the sentiment throughout the North. Judge Theophilus Harrington of Vermont said the only evidence of slave ownership that he would accept was a bill of sale from God Almighty. I think that the fugitive slave law, a much disobeyed law, helps to give some perspective to the often-stated notion that the law must be totally, absolutely, and rigorously enforced.

A second question that has been raised in these hearings is whether this society can afford to set precedent on conscription, and amnesty. That is to say, the question of deterrence. I think this also can quickly be set at rest.

The first reason is that it has been the custom after the wars of the United States, to grant amnesty in one form or another. So, it would certainly be setting no precedent to grant an amnesty after this war.

Second, every amnesty, if one looks historically through the American experience, has been quite individualized and selective, tailored to the particular situation; and inevitably, whatever the Congress and the President did after the Vietnam war, or at this time, would be similarly individualized. One can simply draw no precedent from these various acts of amnesty. No one could possibly guide his conduct specifically on the expectation of a particular amnesty.

In answer to the question of deterrence, the question was raised in the context of making the system of conscription disintegrate. And it is a well-known fact among lawyers that some kinds of crimes are more deterrable than others. Crimes of passion, crimes of conscience are exceedingly difficult to deter, and one ought not to confuse the deterrence problem in this area with the kind of deterrence one is trying to provide when he enacts a taxation law, or an ordinary law governing business activities.

In regard to the question of deterrence, there is something that ought to be said again about the Civil War period. As you know, there was a great furor in part of the country to prosecute Jefferson Davis and other southerners for treason; Davis was in fact indicted three times, although he was never brought to trial.

It was said at that time that the indiscriminate pardon of prominent traitors was sure to encourage treason in the future. Davis should be tried for treason, it was said, so that future generations might know whether such acts as his during a rebellion constituted treason. And Andrew Johnson himself, as you may know, is quoted as saying, "If it was the last act of my life, I would hang Jeff Davis as an example. I would show coming generations that treason should be made odious, and such traitors should be punished."

Well, of course, we didn't do it; and I think the system of military conscription has not suffered too much from that.

I would like to refer to another matter which I think has not been talked about in the context of these hearings, in terms of the requirement of enforcing a law, and respect for conscience.

I refer, in my prepared statement, to a very poignant and moving book about a German subject who refused to serve in the Army during the Second World War, and who was hanged for it. And I think it is a useful perspective on our own situation, to contemplate the situation of a German subject, who was treated to all the argu-

ments in favor of rigorous law enforcement, some of which you have heard this morning.

I put in my statement a letter that he wrote to his children on the day before he was hanged, and I would like to read into the record just a brief excerpt from the letter:

My dear little ones, your photos brought me great happiness. Of course it would be much better for me if I could see you again in person. But you should not let yourselves be disappointed just because your father never comes to tell you stories any more. Today there are many children whose fathers cannot come now or who will never come again * * *.

Many actually believe quite simply that things have to be the way they are. If this should happen to mean that they are obligated to commit injustice, then they believe that others are responsible. The oath would not be a lie for someone who believes that he can go along and is willing to do so. But if I know in advance that I cannot accept and obey everything I would promise under that oath, then I would be guilty of a lie. For this reason I am convinced that it is still best that I speak the truth, even though it costs me my life. For you will not find it written in any of the commandments of God or the Church that a man is obligated under pain of sin to take an oath committing him to obey whatever might be commanded of him by his secular rulers. Therefore you should not be heavy of heart if others see my decision as a sin. In the same way do not be troubled if someone argues from the standpoint of the family for it is not permitted to lie even for the sake of the family. I would not exchange my lonely cell for the magnificent royal palace. It will pass away, but God's word remains for all eternity * * *.

Now, my dear children, when Mother reads this letter to you, your father will already be dead. He would have loved to come to you again, but the Heavenly Father willed it otherwise. Be good and obedient children and pray for me so that we may soon be reunited in heaven.

I think that letter should give us a somewhat different sense about the problems of rigorously enforcing the laws of conscription, as stated by some of those you heard, officials of the military and the Department of Justice this morning.

I would also like to say briefly that there is a kind of irony in this whole enterprise, and it is this. Many of these who have argued for the continued prosecution of the war have done so on the grounds that if we were to leave Vietnam too soon there might be a bloodbath.

I take that to mean that they fear that the victorious Vietnamese will not grant an amnesty to the losing side; and I take it the position of those who expressed concern about that is that whoever wins in Vietnam, despite the bitterness, ought in essence to amnesty the population that allied itself with the other side. I agree with that, myself; and I think it would be an oddity if we pressed the Vietnamese to take that position as among their own citizens, but refuse to take a similar position as among our citizens who refuse to serve.

I think this analogy also casts some light on the problem before you. As to amnesty itself, I wish I were prepared to come before you with a bill all carefully drafted, but I am not. I have said in my prepared statement that the problem of granting amnesty today—though I myself strongly support a universal amnesty with only the most limited exceptions for people who have committed heinous offenses—is exceedingly difficult to do this now, while conscription and the war goes forward.

I have in my statement recommended several moderate possibilities. One is to adopt either the volunteer army idea, or the selective objection idea, and apply it retroactively. Another is to provide the

opportunity to all of those people who are subject to, or have already undergone prosecution, to be reclassified as conscientious objectors, and to bring to bear a rather more liberal definition of conscientious objection than has previously been the case.

As to one of the problems that you raised, about people who, for example, committed bank robbery and that sort of thing; this is not from a legal point of view a terribly difficult thing to take care of. That is, it is possible to declare a very broad amnesty and then to write in certain quite limited exceptions; to it for those people who have committed rape or robbery, maiming and so forth.

In this regard you may at some point want to take a look at the amnesty that was granted by the French, following the Algerian War, and I have had translated the 1966 amnesty law, and I'd be glad to submit that.

(The translation referred to follows:)

LAW No. 66-396 OF JUNE 17, 1966¹

Art. (1). Are fully amnestied the definitive condemnations for crimes or committed in direct relation with the Algerian events as well as for crimes or constituting an individual or collective enterprise aimed at preventing the exercise of State authority or at substituting for this authority an illegal authority, or committed in direct relation with such an enterprise, if the authors of those infractions have been punished with a fine with or without suspension of sentence or with a prison sentence with suspension of sentence with or without a fine, or if condemned to a deprivation of liberty, they were set free before the date of promulgation of the present law.

Art. (2). Are fully amnestied infractions committed before July 3rd, 1962 in direct relation with the Algerian events, when those infractions are punishable only with a fine, or with deprivation of liberty, with or without a fine, of a duration of no more than ten years. Are also fully amnestied facts of insubordination and desertion committed before July 3, 1962 in direct relation with the Algerian events, on condition that those facts are not related to another, non-amnestied, infraction.

Art. (3). Are fully amnestied infractions committed, between Nov. 1, 1954 and July 3, 1962, during operation of administrative and judicial police, of the re-establishment of order or of the fight against enterprises aimed at him during the exercise of State authority or at substituting for this authority an illegal authority.

Art. (5). The President of the Republic may give benefit of amnesty, by decree, to persons who are or who will be definitely condemned for crimes or delicts committed before the promulgation of the present law, and in direct relation with the Algerian events or constituting an individual or collective enterprise aimed at preventing the exercise of State authority or at substituting for such authority an illegal authority, or in direct relation with such enterprise.

¹ J.O. June 18, 1966, p. 4915; Bull. législ. Dalloz, 1966, p. 244.

Mr. SAX. That leads me to the last thing, because you must hear the others today.

It has, as you know, been common both in the United States, and for example in France, to grant amnesty in stages. This was the case in the United States during the Civil War, the series of amnesties ever enlarging, and the same thing was true as to the Algerian War.

This suggests that historically there has been a rising tide of support for amnesty, once the Government got it underway. Once it was able to take even the first steps, it found that it was able to go forward. I'm sure you know the Civil War history very well—that, once the earlier amnesties were granted, President Andrew Johnson

was finally in a position by Christmas of 1868 to declare universal amnesty.

And the same is true of the Algerian affair. So I would, myself, not be hesitant if I were you to begin something—that is, for the Congress to take beginning steps to recognize that it wants to deal with the amnesty problem.

I have suggested in my written statement that one useful thing would be to create a commission with formal status as a congressionally created commission, to bring forward specific recommendations to you. I think the failure to have a uniform agreement at this point among the Members of Congress, as to what steps would be taken, ought not to discourage you from doing whatever you can do to make it clear to the public that you as members of the Congress, view this as an issue of importance with which we must begin to grapple.

Thank you.

(The complete prepared statement of Professor Sax follows:)

TESTIMONY OF JOSEPH L. SAX, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

Amnesty raises anew the agonizing problem of a society's responsibility to assure that the law is enforced. Often stated as the question whether we can afford not to enforce all the law all the time, the proper—and much more difficult—question is when to refrain from enforcing the law. For it is a platitude among lawyers that if every law were rigorously enforced there would be at least as many people inside the jails as outside them. To take only the most obvious of examples, full enforcement of the common prohibition on the use of profane language in public would almost daily clear the streets of people and sweep them into our prisons.

But the problem is much more far reaching than such trivial examples suggest. The purpose of law enforcement is to hold a society together against disintegrating influences: yet total law enforcement would often have just the opposite result. Are we to jail every family member who has committed an unlawful assault in the context of a domestic quarrel, or put in jail every mother who has briefly left her child unattended in an automobile while she stepped into a store? To do so would utterly rend the fabric of family life, undermining rather than sustaining the very purpose for which law exists.

Nor is the obvious need to moderate law enforcement with compassion merely a demand of practical justice in the day to day workings of a society. For there are other loyalties that must be served in any but the grimmest totalitarian governments, defined by their unyielding demand for a total obedience to the state as the ultimate duty of man. The mandates of God's law drive many of the most exalted persons that have passed across the tapestry of history, and one can know only contempt or pity for governments that cannot bring themselves to accommodate to those of its citizens who act out of concern for the state of their immortal souls. One of the most poignant books of recent years, *In Solitary Witness*, is a biography of an Austrian peasant named Franz Jägerstetter who was executed in 1944 for refusing to serve in Hitler's army. On the day before he was to face the firing squad he wrote this letter to his children from his jail cell:

My dear little ones. Your photos brought me great happiness. Of course it would be much better for me if I could see you again in person. But you should not let yourselves be disappointed just because your father never comes to tell you stories any more. Today there are many children whose fathers cannot come now or who will never come again. . .

Many actually believe quite simply that things have to be the way they are. If this should happen to mean that they are obliged to commit injustice, then they believe that others are responsible. The oath would not be a lie for someone who believes that he can go along and is willing to do so. But if I know in advance that I cannot accept and obey everything I would promise under that oath, then I would be guilty of a lie. For this reason I am convinced that it is

still best that I speak the truth, even though it costs me my life. For you will not find it written in any of the commandments of God or the Church that a man is obliged under pain of sin to take an oath committing him to obey whatever might be commanded of him by his secular rulers. Therefore you should not be heavy of heart if others see my decision as a sin. In the same way do not be troubled if someone argues from the standpoint of the family, for it is not permitted to lie even for the sake of the family. I would not exchange my lonely cell for the most magnificent royal palace. It will pass away, but God's word remains for all eternity . . . Now, my dear children, when Mother reads this letter to you, your father will already be dead. He would have loved to come to you again, but the Heavenly Father willed it otherwise. Be good and obedient children and pray for me so that we may soon be reunited in heaven.

Dear wife, forgive me everything by which I have grieved or offended you. For my part, I have forgiven everything. Ask all those whom I have ever injured or offended to forgive me too.

On the night before the condemned man's execution, a priest, Father Jöchmann, entered his cell. He found Jägerstetter completely calm and prepared. On the table before him lay a document; he would only to have signed it and his life would be saved. He pushed it aside and walked to the scaffold. On that day, Father Jöchmann said "I can only congratulate you on this countryman of yours who lived as a saint and has now died as a hero. I say with certainty that this simple man is the only saint that I have ever met in my lifetime."

Our own history too, taken from the most tragic period in our national experience, the War Between the States, provides telling examples on both sides. In 1850 the Congress made it a crime to rescue or assist in the escape of a fugitive slave, and Senator Salmon P. Chase of Ohio chaired a meeting in Highland County that resolved: "Disobedience to the enactment of the Fugitive Slave Law is obedience to God." The Common Council of Chicago adopted a resolution denouncing the Act and forbidding city policemen to render any assistance in its enforcement. Similar laws were enacted throughout Ohio, Indiana, Michigan and Illinois. The pastor of the Congregational Church in Hartford, Connecticut preached a sermon in 1850 typical of what was being said in pulpits throughout the North:

Who is proud of dwelling in a land where men are bought and sold like swine in the pens, and where a Christian who ventures to aid the fugitive from bondage is fined a thousand dollars and imprisoned for six months? We owe no allegiance to such a law and whoever else may regard it, we shall treat it as a nullity.

In Boston, when a runaway slave was seized and brought before the court, a crowd "collected and rescued the prisoner . . . and hurried him through the square. They went off toward Cambridge, the crowd driving along with them and cheering as they went." In Syracuse, a number of prominent citizens participated in the rescue of a fugitive slave. "Eighteen citizens were indicted, but such was the sentiment of the community that prosecutions were unavailing." This was the typical response in Northern cities.

On the other side of the ledger were the untold thousands who, in good conscience, fought on the side of the Confederacy. In law every one was guilty of treason. On Christmas day, 1868, President Johnson proclaimed "unconditionally and without reservation, to all and to every person who . . . participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States." The reason, the President said, was "to secure permanent peace, order and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people." Of this declaration, Carl Schurz said, "There is not another single example of such magnanimity in the history of the world, and it may be truly said that in acting as it did, this Republic was a century ahead of its time."

While the amnesty of 1868 is perhaps the most famous in our history, it is by no means unique. From the beginning of the nation, amnesties have been granted—by Presidents Washington, John Adams, Jefferson, Madison, Jackson, Lincoln, Andrew Johnson, Harrison, Cleveland, Theodore Roosevelt, Wilson, Coolidge, Franklin Roosevelt and Truman. And the subjects have covered the spectrum from property tax revolts to piracy and polygamy, and from military desertion to the Whiskey Insurrection.

One of the most interesting aspects of the amnesty tradition is the light it casts on the question what effect would forgiveness have as a precedent for military recruitment in the future? For several reasons, I think it is plain that it would have no precedential meaning for the future. Our history makes clear that the amnesty question has been dealt with during and after each American war in a quite distinctive way, responsive to the particular situation of the time. Even if one were a close student of history—as few persons likely to be affected by an amnesty are—he would be hard put to govern his conduct on the basis of any specific expectations as to what the government would do in the next war. The only expectation one might reasonably have, at least based on past experience, is that some form of amnesty would be likely in relation to the Vietnam war, as it has been with other wars. In short, amnesties are always quite special events, without significant precedential value, widely separated in time and circumstances. Moreover, it is well known among legal experts that the ability of the law to govern future conduct varies widely according to the kind of conduct sought to be affected. It is easiest to affect carefully planned business conduct by tax statutes, and most difficult to affect conduct guided by passion or conscience. Plainly an amnesty speaks essentially to the latter categories.

Another matter that has troubled many persons is whether a grant of amnesty to war resisters or deserters would appear as condemnation of those who responded to their government's call to service, who fought and some of whom died, often under circumstances of great courage, and at great personal sacrifice. Certainly no such condemnation or abandonment could be read into any amnesty. Quite to the contrary, an amnesty is preeminently an act of reconciliation welcoming back into the society all those who have followed their own consciences, whichever way their sense of duty carried them. To grant an amnesty is not only to relieve the legal liability of certain persons, but to say to all those who have opposed the war that it is time to bind up the wounds of ill feelings with those who have supported the war; to reconcile families as well as communities that have been split by the war; and to put aside all thought of retribution on all sides as to those ordinary citizens who responded to an inner call of duty, whichever way that call may have led them.

In this respect, it would in my opinion be a necessary concomitant of any amnesty that all thought of war crimes prosecutions be set at rest for ordinary citizens or soldiers all who only followed the dictates of their conscience or the orders of superiors, whether on the battlefield of Vietnam or elsewhere. Unmitigated vengeance can only be destructive. We should, in this context too, take a lesson from the War Between the States. For surely it cannot be said that the pardons and amnesties granted to those who fought for the Confederate States were taken, or should have been taken, as a condemnation of those who bravely fought and died for the Union.

It may help to put our own views on this domestic matter into perspective to note that some Americans who have supported continuation of the war in Vietnam have done so out of a concern that if the forces against whom we have fought came to power, there would be a bloodbath. That is, they fear the Vietnamese would *not* amnesty their own fellow countrymen who fought on the losing side. I take this concern as suggesting that amnesty would be appropriate, and indeed, the only decent thing, for the Vietnamese among themselves. I share that view, and I think we should take no less generous a view toward our own citizens.

Before turning to a specific consideration of the terms and arrangements which the Congress might wish to consider in regard to amnesty, I would like to say a few words out of my own experience with some individuals who would be affected by an amnesty. It would be a terrible mistake to believe that an amnesty, even if it were granted tomorrow, would somehow relieve war resisters and deserters from all of the pain and trepidation which those who served fully in the armed forces have undergone. Several years ago, I visited a number of deserters in Paris and Stockholm, and, as has been the case with many college teachers, I have had many, many hours of conversation with young people who were trying to work out their own response to a call for military duty that had come or was on its way during the Vietnam war. The experience for these people was exceedingly trying. The effort to resolve the conflict between that sense of duty to county and community with which they had been imbued, and the duty to one's conscience, is an experience not to be envied or lightly passed over.

They saw people and institutions that they respected greatly sharply split over the legality, propriety and morality of the war. They saw and read of conduct that tore the nation apart. They saw members of the Congress turn one way and another over the nation's responsibility. They were told that to participate in the war was to be implicated in a national crime; and that to resist the draft was a grave felony. They saw friends die in battle, and friends languish in federal prisons.

They did not find the easy accommodation between honor and duty that was available to their fathers who fought in World War II, or even to persons of my generation who served in the Armed Forces a dozen or fifteen years ago.

There is no "typical" deserter either in background, beliefs, or attitude. The young men I met in Stockholm came from all over the United States—a surprisingly large number of them from small towns in the South and Middle West. Their backgrounds were as varied as their origins—the sons of truck drivers and pharmacists, of railroad clerks and lawyers, even of professional soldiers. There were college graduates in the group and men who had not gone beyond the eighth grade. Some had been drafted, but many had enlisted in the armed services. A considerable number had voluntarily joined the Marines, and several were Special Forces and Airborne volunteers.

I was surprised to learn how many of the deserters had not been opposed to American policy when they entered the military—but had reflected conventional acceptance of the war. In retrospect I realize that this should not have been surprising, for answers to the question, "Why did you desert," frequently emphasized the sharp contrast between what the man had heard and believed before he entered the Army and what he saw with his own eyes after he was exposed to the reality of the war.

There is no easy answer to the question why these boys deserted, as there is no easy answer to any of the problems of human motivation. But I do know now that fear for one's personal safety cannot explain the actions of many of the deserters. One boy had been in the Army for 2 ½ years and had only 60 days left to serve; he was in Germany and with no prospect of going to the war zone. He told me he felt compelled, before his discharge came, to face up to the responsibility of being a part of the military enterprise carrying on the Vietnam war.

Another deserter from Des Moines, Iowa, told me: "I was glad to be drafted. I was told all the bad things about the Viet Cong and I believed them. In Germany I was assigned to guard a deserter and we began talking. I thought he had been brainwashed by the Communists. But later I got talking to Vietnam veterans and began to hear, 'the killing doesn't matter because they're just a bunch of slant-eyes.' I began to ask myself 'Who's really being brainwashed? When you ask that, that's it.'"

The only common denominator I found was in what happened to these men after they deserted. It was then that they began to think about what they had done, to try to figure out the meaning of what had happened to America, and to them. They sought to understand what had caused them to desert. They began to read, many for the first time in their lives.

Their desertion was overwhelmingly the product of personal experience, sometimes in the battle area, sometimes in the preparatory training. They came prepared to believe in the justice of their conduct; and they found disillusion. They took a risk that none would envy, finding their way to a strange country, without jobs, without even a common language, and without any certainty that they would not be returned for prosecution. They lived poorly, uncertainly, and often unhappily. They have been tested in ways that few of us have ever been tested; they have been tested in ways that no one can envy. And they have borne, if not the greatest adversity, adversity enough.

I know there are many who believe that deserters and resisters are largely individuals who acted simply to save their lives from the perils of war. And no doubt some are, just as some of our students who truly opposed the war undertook quite safe military obligations because they could not face going to jail. My own observation is that few deserters viewed themselves as taking the easy way out, and their way was not an easy one. But I do not pretend to be able to plumb the emotions of all who served or of all who refused to serve; nor to evaluate critically the motives of one who refused to risk his life for a cause he thought deeply unjust. I do think there is a time for that compassion which transcends analysis, and I strongly feel that now is such a time both for those who have served and those who declined to serve.

Let me now turn, finally, to some thoughts upon the specifics of amnesty that the Congress may wish to consider.

To deal with amnesty at this time presents a number of problems unlike those presented earlier in our history that make the issue of implementation considerably more complicated. Most amnesties in the past dealt with situations that were, at the time, already completed. It was, therefore, possible simply to absolve a known class of persons of conduct already completed. Alternatively, amnesties have often been conditional, and partook of a bargain; deserters, for example, have been forgiven past conduct if they would return to military duty; or rebels pardoned if they would swear an oath of allegiance for the future.

Neither such technique is responsive to the present problem. To grant deserters amnesty conditioned on fulfilling military service, or even on some other non-military service, would not, in my opinion, heal the divisiveness created by the war. To fail in creating a true reconciliation is to fail in the principal purpose of an amnesty.

Moreover, there is a terribly complex practical problem. It would be anomalous to amnesty war resisters and deserters of the past few years while military conscription continues of new people who might also have conscientious objections to service, and while the war continues.

In addition, there are a number of persons who ought to be considered in any general sort of amnesty though their conduct did not involve personal military service. Some such persons have been charged with interfering with the Selective Service laws, and some may have been charged merely with crimes such as trespassing or the obstruction of traffic. From a technical point of view, dealing with this wide ranging panoply of offenses presents the most difficult problem of all.

What these comments suggest is that the amnesty problem is not easily extricated from the broader problems of what has been called the "selective conscientious objection" issue in exemption from military service, and the problem of the volunteer army.

If Congress were to accept the volunteer army idea, for example, it would be quite consistent to apply that idea retroactively to all people who could have opted out of military service previously, had there been an all volunteer army at the time they became eligible for military service. In this way, deserters and draft resisters now under the cloud of prosecution or already convicted could be relieved of liability *nunc pro tunc* and be put in the same position as one who first becomes eligible for military service now or in the future. Perhaps the Congress would wish to carve out an exception for that no doubt very small group who may have deserted under fire, but in general the problem could be solved simply by requiring those who did not wish to serve and would not have been required to serve in a volunteer army to so certify.

A slightly more elaborate procedure could solve the problem under a selective objection arrangement. Both for the past and the future, persons eligible for military service could expunge their liability by filing a document asserting their conscientious reservations about service at the time and under the circumstances in which they were called, or are being called, to service in the armed forces.

A third, but more limited approach, would be to allow a reopening of the present conscientious objector status to all those who have resisted or avoided service, failed to register, or deserted. If the present law were then generously applied, perhaps by a special board of examiners created by the Congress, at least a substantial number of the problems could be dealt with. To be sure, in such circumstances, it would be most important to assure that current implementation of the CO rules by draft boards was not more onerous than the application being given retroactively.

For those persons who have violated the law in ways that do not involve simply their own failure or refusal to serve in the armed forces, a rather different problem is presented. In some instances, such persons engaged in active, rather than passive resistance, and no doubt some distinctions might have to be made related to the nature of their activity. For such persons, whether already convicted and in jail, having completed a jail term, or subject to prosecution, it would be possible to create a board of review. Where such persons were prepared to make application to the board, and to demonstrate that their conduct or alleged conduct was the product of conscientious objection to the war and was not of itself significantly harmful to human wellbeing, they

would be entitled to a board recommendation for pardon or amnesty. I am not certain about the propriety of this particular approach in relation to the technical requirements of the ongoing criminal law process, but I am confident that a workable and lawful means of meeting this problem could be arranged.

I would like to be able to recommend some simple and absolute process to deal with all these multifarious problems, but I am afraid the issues are too complex to admit of any solution that simply states an amnesty for all conduct related to the Vietnam war, particularly at this time and with the present state of the selective service laws. I do not, by this, mean to suggest that the Congress should delay action on the amnesty problem, for I believe that the issue is an urgent one.

I therefore suggest the following: That the Congress at the earliest possible date create a Commission or Task Force to study the amnesty problem, including detailed information about the numbers of people likely to be involved in any of a variety of amnesty proposals, the range of legal violations that would have to be dealt with in any comprehensive amnesty, and the changes in the law that would be required to carry out recommendations for a comprehensive amnesty.

Such a Commission should also recommend detailed procedures for undertaking the implementation of an amnesty, and recommend the specific statutes or resolutions needed to convene a working amnesty board or boards. I think it *will* be necessary to create a working administrative board, in some respects along the lines President Truman used under his Executive Order 9814 of December 23, 1946, rather than anticipating that the problem can be dealt with in a single statutory statement.

As you know there has been some controversy over the question whether amnesty is within the authority of the President or the Congress, or both. The better view seems to be that both the Congress and the President have amnesty authority. *Brown v. Walker*, 161 U.S. 591, 601 (1895). It would hardly seem appropriate for the amnesty issue, designed to draw the nation together, to provoke a conflict between two of the branches of government. My own view is that a desirable approach would be for the Congress to set up an amnesty board, with authority to examine cases or classes of cases, and to make, as its final act, a series of recommendations to the President. By having the initiative action in the Congress, with final dispositive action following recommendations to the President, both the legislative and executive branches would be drawn into participation in healing the wounds of war. At the time that the President acts on amnesty recommendations of the kind described above, it would be appropriate for him to exercise his pardoning power as to those members of the military who have engaged in unlawful conduct in the battle zone that he deems equally to be needful of that healing legal grace which is entrusted to him by the Constitution.

Senator KENNEDY. Mr. Schwarzschild?

Mr. SCHWARZSCHILD. With your permission I'd like to yield to Dr. Gaylin, who is under some pressures of time.

Dr. GAYLIN. Thank you.

I am speaking now again not as representative of Columbia or the Institute of Life Sciences, but rather as a researcher in psychiatry who has worked with the war resisters for the last 5 years.

In considering amnesty, I think three questions are paramount:

Who are we forgiving? That is, the nature of the criminal: What did they do? The nature of the crime; and the consequences of forgiveness.

My personal experience is with the imprisoned war resisters. I will speak primarily of them, although other research indicates common features with those who fled the country.

What type of man is the imprisoned war resister? It seems natural to presume that the CO in prison was analogous to the college radical, and actually he was not; the prison population was somewhat different, entirely different in many ways.

Close to 80 percent of them were Jehovah's Witnesses. Now you may notice that my statistics are somewhat less precise than statistics given you by the General earlier today. I think that is because those of us who gather statistics tend to have less respect for them than the people who interpret them. Gathering statistics in the social science area is a very peculiar phenomenon. In this research alone, for example, not asking the enormously difficult question of why these people did something, because motivation is always difficult to evaluate, but merely who these people were, I had to go through 750 selective service records, because the error about who was there, let alone why they were there, was in excess of 100%.

So I had to individually evaluate.

I would caution you when you hear careful statistics of 4.6 percent and 6.3 percent about human motivation, to question how they were gathered, and on what statistical basis, and who were the interpreters. These are very difficult social science questions.

I'm sorry for that diversion, but I thought that was a crucial point that came up earlier.

Most of these men came from a personal sense of moral outrage with the war and a strong conscience, which would permit them neither to participate in it nor avoid the confrontation. While they were political, they were still not politicians. They were not for the most part organizers, and when they attempted such activity they often failed. They were activists, but activists who believed in action by example and witness, rather than exhortation.

Politically they subscribed to no clear-cut dogma. Professed Marxists, even in the loosest sense, were rare. Some were conservative, "Goldwater" Republicans. Many did not even think in political terms. Many described their political philosophy as "Christian pacifist." There were very few who by any stretch of the imagination could have been called "hippie" types, unless one wanted to include the Catholic Worker group who in dress and manner of living might have been misinterpreted as such, but who intention and action were entirely different. Some would not have gone to prison at all if they had had the money to go to Canada without inflicting hardship on their families.

Some should not have been there at all. One example: An Amish boy who was raised in that religion but who in his late teens stopped attending the church, although he continued to subscribe to its principles. His draft board refused him CO status. Another satisfied developing court rulings as to CO status, but came from a small southern town where his draft board shared his ignorance of his rights. There was no lawyer to consult or guide his appeal.

Some came in specifically to test the legal validity of certain aspects of the war and the draft—either feeling that the peacetime draft was illegal, or that war violated rights of individual conscience as proposed at the Nuremberg trials.

Senator KENNEDY. I suppose you are as distressed as I am about the attitude of the Justice Department regarding men who were convicted under rules held in violation by the Supreme Court. The Justice Department feels no responsibility or duty to insist that justice be done, and to see that these people are released.

Dr. GAYLIN. It seems to me an appalling interpretation of justice as only including the punitive aspects; that's not normally the way we think of justice. I can think of one boy who was in prison and under the new ruling found that he was in for a punitive action, and he then had to file his own brief, and by the time he found out about it, it was 3 days before he would have gotten out of prison. He got out; therefore he had not committed a felony, he was not on probation, and he was reclassified 1-A by his draft board. So his benefits were not very great.

Senator KENNEDY. This is what so many of the young people are concerned about when they hear the phrase, law and order. You have the Supreme Court making an interpretation concerning conscientious objection which would apply to certain individuals, and these individuals have been indicted and are serving time. Yet the Justice Department makes no effort to insure that they know about the decision.

And these are small incidents. But I would think that this generation would react to this, as well as Kent State, Jackson State, the war, and all the rest. So much of our society is puzzled by the fact that young people are turned off about these things. Yet you hear representatives of the Justice Department appearing before a judiciary committee and saying—looking at each other—and wondering whether those statistics were available, or whether they could find them.

And you would expect, that there would have been someone who would have insisted that they pursue the matter to prevent an unjust situation from continuing.

Dr. GAYLIN. I found the statistical data in the Justice Department the worst that I had found in any individual body of material we went through.

Senator KENNEDY. Well, perhaps you can help us, or suggest to us the kinds of inquiries that might be made. We're very interested in it. We have a responsibility in the administration of that Selective Service Act to review the regulations, rules, and procedures of the Justice Department as well. This is our area of jurisdiction. We'd be terribly interested in hearing from you on that particular matter.

I know that isn't what you're here for today, but we'd be happy to have it.

Dr. GAYLIN. Now, over half my sample group were true pacifists who had subscribed to total nonviolence. At least a third had clear-cut advance indications that they would not have been eligible for the draft if they had chosen to exercise their rights to deferment, for example, one was near blind, one crippled by polio, one a lifelong practicing Quaker, etc.

In personality they tended toward the quiet, contemplative, and introspective. There was a relatively low level of aggressiveness and hostility, particularly when allowing for the elevation from norm that one would have expected to see in a prison environment. In sociological terms they were service-oriented individuals who believed that a man must be judged by his actions, not his statements, and that ideals and behavior were not separable phenomena.

Why did they enter prison then? As an act of witness; as an obligation to pay the price if one breaks the law; as a political gesture,

feeling that if enough of those who opposed the war would refuse to serve it would ultimately destroy the system by overloading the already shaky prisons; as a propagandistic purpose to dramatize the opposition to the war. And for others, simply because they had no choice; they could not kill and they would not avail themselves of a conscientious objector law that they saw as too selective and therefore prejudicial to those excluded.

It should be remembered, however, that the Army never needs more than a small percentage of the eligible male population. Because of this, there are many outs. Besides the preferential treatment of the educated—which may be defended on the basis of maintenance of the country's institutions—there are other loopholes. All that is necessary is sufficient education, sophistication, money, or influence to exploit them. Yet the men who went to jail chose not to avail themselves of these. In this sense they were imprisoned by their own conscience.

I might say that none of the sons of those in the social circle I mix with have a boy who was sent to Vietnam, though they all have boys of that age.

Not all war resisters went to prison. Some chose to flee the country, and this may be seen by some as a less courageous or less noble way. I am not so sure. But then, what is the nature of even this criminal? I suppose we would have to say that he is a frightened young man who is unwilling to die with no conviction of the purpose that his death might serve; or an angry man who resents being put in the position of having to kill or be killed; or at worst, he is an irresponsible man who in refusing to undertake one burden, has had other burdens, not inconsiderable, imposed upon him.

Really to pass judgment on a question of amnesty you ought to consider not only the nature of the criminal but the nature of crime and beyond that, the purpose of punishment.

The nature of this crime is peculiar. Anything may be said to be a crime which violates a statute. In this case specifically we are dealing with the Selective Service Act. The nature of the crime here is unique because of the special circumstances of the law. The draft is a sometime thing—only periodically required, skipping generations, appearing and disappearing with war and peace. It is not a part of ongoing tradition. It is not a conventional and assumed aspect of the American way of life—although it may be becoming so. Since we do not see it as a stage of normal citizenship—it comes as an interruption, an unusual demand rather than a usual duty—it seems arbitrary and quixotic, hitting one, skipping another, and because of that will always be greeted as unfair. What is ask of the very small minority of our population is that they be prepared to do no less than offer their lives. The privilege of a government in asking this must be reserved to the most critical times, for the most compelling purposes. These young men refused to be placed in the position to kill or be killed. Presumably the purposes of the war did not have that sense of vital moral urgency required for such action. Whether it would have had to the majority of us if it was a decision involving “us” rather than “them” can never be answered theoretically. It is one of the dangers that arise when the legislators, middle-aged, and legislated, the young, are different populations.

The crime of the war resister may have been in being premature prophets. At any rate, they raised a question and came to a conclusion that was at one time unpopular and now is the accepted view of the majority. Who is there left who believes that Vietnam is worth the loss of any more lives?

But when a person has broken a law, even an arbitrary one, ought they not be punished as a corrective experience? I am not as ready as some liberals to state that there is no place for punishment in learning or in rehabilitation. We know punishment can be effective in individual cases of child raising. I can conceive its serving the purposes of minimally discouraging some crime. Will punishment serve to rehabilitate these particular criminals? What is there to rehabilitate? They are not for the most part violators of law in general. Only this law. For the most part, they had been well habilitated in the society.

Will the threat of punishment discourage these men from repeating their crime? What repetition of the criminal act can there be? When the war is over and there is no more draft they cannot possibly violate that law. Indeed, were there to be another war, these particular individuals would be over age and exempt. Recidivism has no meaning in terms of a draft evader.

What, then, of the concept of example—the general deterrence principle? If these men are forgiven will it not make it easier for other young men, in future wars, to avoid service? The entire crime prevention system in this country rests heavily on this concept—but then our crime prevention system has been a notorious failure. Deterrence, however, requires a sense of immediacy, involvement, and identity. It is unlikely to have any effect with war resisters where the punished example and the potential criminal are separated by years, let alone generations. The war will be different, the society will be different, the man will be different. And meaningful memory will not last that long. Do the young people today really know what happened in 1942 or 1917 or 1863, or if they did know, could they possibly relate to it?

Is there some absolute moral principle that demands punishment independent of its purposes? I do not know, but if so, to avoid being monstrous, the nature of punishment must bear some quantitative relationship to the nature of the crime. We should not take lightly the price that these men have already paid. Is eternal exile a punishment warranted for any crime? The men I met in prison have paid a price in loss of youth, in loss of self-confidence, in loss of ideals—in addition to a loss of precious years of life. A most touching example was a dialog I had in prison with a former Catholic seminarian. I asked him how he would have described his political position. He said, "When I came in I would have called myself a Christian pacifist, but all of that has changed." "What has changed?" I asked. "The Christian or the pacifist?" He smiled wryly and said, "Both, I'm afraid. The pacifist by conviction. The Christian out of despair."

Amnesty will serve the society which grants it as well as the individual to whom it was granted. Without amnesty this war will never end in our own minds. The country will bear the burden of guilt for

its thousands of estranged sons. Guilt is an unbearable emotion. As a psychiatrist, I can state that. We go to great lengths to avoid it. If a set of facts produce too much guilt we may deny the facts rather than suffer the emotion. Men of good will supported this war in its early stages, presumably for purposes of high ideals. As more and more people were killed, doubts began to set in. But to those in positions of responsibility such doubts are unbearable. With each killing, their emotional stake in the war became greater, consequently the need to justify it became greater.

If too much is invested and too much time elapsed, the truth can never be faced. We saw something similar with the radicals of the 1930's who sacrificed greatly for their dedication to the Communist Party. They simply could not face the evidence. Even as late as the Slansky trial in Czechoslovakia in 1951, and ultimately the Khrushchev revelations, some of them simply could not believe. So great was their sacrifice—giving up home, status, family, jobs—that they had to deny their senses rather than surrender over-invested illusions.

As long as personal guilt is present, there will be the tendency to discount and discredit the evidence, to preserve oneself from having to believe things too painful to be believed. If we are to be done with this war we must alleviate the suffering even of the proponents of the war. We must free all of the victims. To alleviate our own guilt, we must grant amnesty to the war resister. We must forgive these young men for being prematurely right.

Finally, the question arises as to whether they would accept amnesty. I do not trust self-elected spokesmen for a group as disparate as this. I believe most would welcome it, particularly if the freedom and full civil status which they value dearly, were restored. I think the resisters would be comfortable with amnesty. It fits into a tradition they understand—a tradition which they embrace—of decency, love, and kindness. Let me repeat that these men have paid an enormous price. Do we really want to have them paying it all of their lives? Remember about whom we are talking: 18 to 25 year olds. I am not sure what purpose would be served by refusal to declare an amnesty, except to further exhibit a sense of vindictiveness and a desire to punish. There is a joy in forgiveness and a relief. It offers a pride and pleasure that America could use today.

It is often questioned whether amnesty would be "fair" to the war dead. There is no "fairness" to the dead—only to the living. Fairness would seem to lie in ending the killing of innocents in an unworthy cause. A television panel show some time back interviewed a group of parents of imprisoned war resisters. After the interview of that panel, in a rather cruel and cynical contrast, a group of parents of children who were killed in Vietnam were interviewed. Perhaps the producer expected some dramatic accusatory confrontation by the bereaved parents. If he did, he underestimated the human mind and the human spirit. The parents of those who were killed were most sympathetic and compassionate to those mothers with boys in jail. "I'd rather have a live boy in jail," one said, "than a son dead forever." America doesn't need either. Let us be thankful for those who are alive. Let us welcome back those of our youth who are still capable and wanting to come back. We need them.

It is one of the ironies of a liberal democracy that we justify violation of our moral code only in defense of it. We make a basic assumption that if a society is good, and if its survival is threatened, we may do bad things to preserve it. In defense of our society and its values therefore even killing may be justified. The crucial question, of course, is how many violations of its own values the good society can commit before these very acts redefine the nature of the society so that it is no longer good. Only that which is worth dying for is worth killing for—and maybe not even then. A vengeful unforgiving state is worth neither. It is the concept of forgiveness that we are now considering.

Senator KENNEDY. That was an excellent statement.

We're going to recess for 10 minutes.

(A brief recess was held).

Senator KENNEDY. What do you think could really be done to try and change the attitudes among American people to accept the assumptions which you offer for amnesty?

Yesterday we heard from a couple of young Canadian exiles who mentioned a Newsweek poll. That poll showed 7 percent approximately of American people who support the position that you have talked of this afternoon.

What has to really be done to move the country to come to an enormously compassionate rationale, completely justifiable, and a position I have enormous sympathy for. How do we go about it?

Dr. GAYLIN. Well, I think perhaps, in order to change 7 to 70 percent, less than one might anticipate in advance might be required. I think it is a little bit more optimistic.

The average person when asked a question on a poll, is as likely to answer that which he thinks is intelligent to be said, or that which he thinks is wanted to be said, rather than that which he believes, because often he has no fixed intellectually determined beliefs.

Now I would suspect that President Nixon's visit to China could create a drastic change; for example, in an attitudinal question about what do you think about Chinese this, that, or the other, almost overnight.

If you asked someone to list the 10 outstanding ladies of the world, it would change overnight with an election in the United States, even though the ladies will not have changed. So there is room for leadership and position, and charisma. Many people in the United States do not have fixed opinions. I don't think we are essentially a political Nation. I think we are a moralistic Nation in many ways, but not necessarily political.

Now I think the sponsorship of positions, even when they seem hopeless, of certain people who are in doubt with leadership qualities, can be enormous in educating the public. They are told that it is good to think that way because Senator Kennedy thinks that way, for instance.

Senator KENNEDY. Senator Hart feels that way, too.

Well, you know, I remember going back to the first bombing halt in Vietnam, and they took a poll and 78 percent of the people were for halting the bombing, and then the President resumed the bombing, after 35 days, and 80 percent, everybody was for resuming the bombing.

I think there is much to what you say.

But it is a lot easier, I dare say, at the top of the mountain to change and create the climate and atmosphere than where we are in terms of the Congress, the Senate, or I suppose as a teacher or a psychiatrist. Just listening, over the course of these last two and a half days, it sounds so eminently logical and sensible; and representing great compassion and feeling. But I know when I go back and look at that mail count, after Mr. Kelly finished talking to 70 million people last night on television, we're going to have a hard time in changing that attitude.

Mr. SCHWARZSCHILD. Mr. Chairman, if I may make a comment on that. It is precisely to give some reality to the point made by Dr. Gayline that the American Civil Liberties Union foundation's project on amnesty was created. To rally into public effectiveness, visibility, and articulation those forces in the society—the organizations, the writers, the legislators themselves—who support amnesty. It is our hope that, when their voice is heard and when that sense of compassion to which you responded so graciously will become more evident in society, others will take note of the decency of that position, particularly once the passion of the war shall have cooled after the war ends.

We hope that that will also make it easier for the legislature and the executive agencies of government to tackle this subject with a much smaller degree of risk than is now implied by your mail count.

Senator KENNEDY. We ought to hear from you, Mr. Schwarzschild.

Mr. SCHWARZSCHILD. Mr. Chairman, Senator Hart, you have spoken very graciously of the patience of your witnesses, and I will cut my statement rather radically in order to save you time.

Senator KENNEDY. We will include it all.

(The prepared statement follows:)

STATEMENT OF HENRY SCHWARZSCHILD, DIRECTOR OF THE PROJECT ON
AMNESTY OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

My name is Henry Schwarzschild. I am the Director of the Project on Amnesty of the American Civil Liberties Union Foundation. I am grateful to you for having asked me to testify and I am pleased to be able to submit my views on the question of amnesty for those who have refused to participate in the War in Southeast Asia.

For over three centuries, America has been the place of refuge for the political exiles and refugees from religious and political oppression. It is one of the unprecedented consequences of the War in Indochina that America has now produced, for the first time in its history, a large class of American political exiles, refugees and prisoners of conscience. These men, numbering probably well in excess of 100,000, are of the young generation of Americans. They have had to confront in the most painful fashion the dilemma of deciding whether or not directly to participate in a war that the overwhelming majority of this nation wishes had never begun and prays may be quickly brought to an end. The revulsion against this war is now almost universal in our society and in the world, and even from the very beginning of American involvement the nation has been deeply divided over the merits of this war. No wonder, then, that so many thousands of young men, of whom their government demanded that they do the killing and the being killed in a war which they could not support, that was unpopular and undeclared, refused to participate in that cruel War in Southeast Asia. Some refused to submit to the draft; some, once inducted, left the military service on their own; others went underground or

into prison or into exile or into military stockades, and still others so rebelled against the dehumanization of the war and of military life that they were expelled from the armed services and given less than honorable discharges. While men of our generation dispute the merits of the war and the blame for it, the burdens of the war will be the lifelong inheritance for these young men, and they alone will bear the legal consequences of a war that began when they were not even old enough to vote—unless, that is, this nation decides to end this war and to bring about a reconciliation with those of its young sons who could not participate in this tragic and destructive episode of American history, by extending to them a broad, plenary, and unconditional amnesty.

This nation has been bitterly divided—indeed, polarized—by the war. It is of the greatest importance for the future of this country that we do whatever can be done to mitigate the destructive effects of the war, at home and abroad, on behalf of the victims of the war in Asia, for the families of those who were killed, for those veterans who suffered injury and life's dislocation, and for those other victims who have undergone prison or exile. One step in the healing process must be the declaration of amnesty for those many thousands who have been convicted or are subject to prosecution, so that they can return to our society free of any legal impediments and can share with us all the opportunities and responsibilities of building a better nation.

In the history of the United States, amnesty has an honored tradition. From the earliest time of the Republic on, virtually every military conflict in which the United States has been engaged has been followed by an amnesty, by a governmental exercise of the power *not* to prosecute those who for political or moral reasons came into conflict with the laws. In 1795, President George Washington granted "a full, free and entire pardon" to those involved in an insurrection in Pennsylvania against the United States. In explaining this to the Congress, President Washington said:

For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me not less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity and safety may permit.

During and after the Civil War, Presidents Lincoln and Johnson offered amnesty even to those who were engaged in treason and open war against their own government. President Johnson declared, in words profoundly relevant to our country's present condition, that a retaliatory or vindictive policy, attended by unnecessary disqualifications, pains, penalties, confiscations and disfranchisement, now as always could only tend to hinder reconciliation among the people and national restoration, while it must seriously embarrass, obstruct and repress popular energies and national industry and enterprise.

World Wars I and II engaged the overwhelming, well nigh unanimous support of the American people. Yet, even there, upon the ending of those wars, many of those who had refused to participate in them because of their religious, moral or political convictions, were pardoned or amnestied. How much more appropriate, after the War in Southeast Asia, which never engaged the wholehearted support of the nation, for which the formal consent of the Congress was never sought or obtained, which many Americans in and out of the Congress thought from the beginning to be a ghastly mistake if not indeed a terrible crime—how much more appropriate, indeed, mandatory, to free those who refused to fight this war far from our shores.

Amnesty, I want to emphasize, is not identical with pardon. It is distinguished from pardon in two significant elements. A pardon affects a *single person*, while amnesty extends to a *whole class* of persons, and where a pardon forgives a past offense, for which punishment is remitted, amnesty is "oblivious" of certain acts, a sovereign declaration that the best interests of society as a whole will be served by dismissing the question of any possible culpability. Amnesty is not a finding of criminal conduct and the remission of penalties, but rather it extinguishes the interest of the law in the acts amnestied. Amnesty, of course, is not a "right," but rather a sovereign state's discretionary act of grace and reconciliation. The American Civil Liberties Union, which traditionally seeks to protect and extend the constitutionally guaranteed rights and liberties of the individual, now—through the Project on Amnesty of the ACLU Foundation—seeks not rights but an act of moral and social generosity

and greatness from American society. We make this plea on behalf of the young generation, many of whose most promising and courageous members are in prison or exile because of the war. All the young generation has grown up in an age in which they have experienced this country only as a mighty and powerful mechanism that pursues objectives and interests, that asserts and applies power. They have not known this country to act out of humane and selfless principle. Much of the alienation and disaffection of the young generation from the America they have observed might be mitigated if, by the enactment of a broad and generous, non-punitive amnesty, the government could once again be seen as sensitive to the passionate concerns for peace and justice that animate these young men.

To be sure, historically amnesty has been most often an act of the Crown, of the Sovereign, of the Chief Executive. But a series of legislative enactments, of Supreme Court decisions, of constitutional and legal doctrines and interpretations, going back over a hundred years, leave no doubt that the Congress, as well as the President, may enact amnesty or remit all penalties for offenses. We therefore gratefully welcome the concern shown by this Subcommittee and by numerous members of the Senate and the House of Representatives in the subject of amnesty for those who refused participation in the War in Southeast Asia. We believe that both the executive and legislative branches of government can properly enact amnesty, and the present hearings will do much to clarify the problems and to educate the country and the government about the need for and the benefits of amnesty.

We urge that amnesty be enacted promptly as the war is brought to an end. It is hard to believe that this war, which the people want ended, which the President and the Administration talk about ending but which is still being pursued by an escalated air war and by indigenous troops trained and supplied by us, can long continue. It is not too early then to consider, debate, and resolve the issue of amnesty, along with other great issues of the war and the immediate future of our country.

We urge that amnesty be extended broadly, that is, alike for draft refusers, for deserters, for exiles living abroad, for men convicted by courts martial, for those serving sentences in prison, for those who have already served their sentences, for those who have been separated from the service under less than honorable conditions, for those who saw disavowal of their citizenship as their only way out, and for civilian acts of protest and opposition to the war. An amnesty that would cover only draft refusers (as some propose) would compound the inequities already visited upon the young generation by the war and the draft. By and large, the middle class, white, well educated were spared from the military service—they found shelter in the reserves, in college deferments, and in conscientious objection. The disproportionate burdens of fighting this war have fallen upon the poor, the less well educated, the Black and other minority groups. But the same qualities of good education, middle class and white race in a general way also characterize those who refused to submit to compulsory military service and went to prison or into exile or underground. It is again the poor, the less educated, and the members of minority groups who contribute a much larger proportion of the deserters, of those who submitted to induction and became aware only *in* the military of the cruelties and irrationalities of the war. It is these men, too, who in glaringly disproportionate numbers have been tried by military courts for various offenses and who have been given less than honorable discharges—impediments of the most serious nature for their future lives and careers. It would be outrageous if amnesty, too, were to become an instrument of class and race discrimination, we are in effect so many other institutions and actions of our society. The circumstances which impelled these as well as those to draft refusal or desertion are the same: the war and the draft. And the motives were usually the same: a refusal to submit to the machinery of the war, whether for religious, moral, ideological or personal reasons. All acts and failures to act, we urge, that arose out of the war, that would not have occurred but for the war, and that might be subject to criminal penalties, should be included in amnesty.

We urge that such an amnesty ought to be plenary, that is, it should automatically cover all the classes referred to, without a case-by-case examination of the motives that prompted the acts or failures to act that are to be amnestied. To begin with, it is in the very nature of amnesty that it extend to classes of political acts, not to singled-out individuals. Equally important is

the need to avoid putting these young men through an investigation of their conscience, their religious training or beliefs, their bona fides, and demanding that young men who are not yet or barely out of their teens be able to articulate a system of beliefs, a *Weltanschauung*, that will satisfy administrative or judicial bodies of the government. Those who have pleaded conscientious objection to war have already had to undergo this searing experience, that would be a challenge to men two or three times their years. Here again, the inarticulate and less intellectually sophisticated have suffered from discrimination—and it would be cruel to make amnesty once more a means of unfairly discriminating against those with fewer advantages. (The Amnesty Board created after World War II by President Truman subjected selective service violators to a case-by-case examination and recommended only about 10% of the over 15,000 men convicted for presidential pardon. The Board's title was a misnomer; it was really a pardon board, not an Amnesty Board, and the results of its work were systematically—though perhaps not intentionally—discriminatory against lower-class, uneducated, minority-group draft violators. It applied criteria as previous convictions, that eliminated lower-class persons who classically are more often arrested and convicted for petty offenses, and excluded whole groups of religiously motivated war resisters. Even though the total number of cases before the Truman Amnesty Board was perhaps one-tenth of the number that a board would have to consider now, they spent a very few minutes going over each case history to decide a man's fate.) The main point, however, is that the legal debris of the War in Southeast Asia ought to be removed from the lives of *all*, irrespective of motive or act, so that this generation may not be the only one who will bear the adverse consequences of the war throughout their lives and careers. No system of amnesty can or should weigh the ideas and motives, the pressures and impulses that made young men and women resist participation in this tragic war. (We do believe, however, that where there are allegations or findings of acts of substantial injury to persons or property, it might be proper to look into the circumstances and responsibility of the individual draft resister or deserter.)

We urge that no conditions whatever attach to the amnesty granted and that neither alternative nor national service nor any formal declaration be required. In the first place, the deserters and draft evaders have already suffered the pains of prison or exile or underground life, to say nothing of the fears and risks of the lonely decision to resist the awesome power of the United States government and its instrumentalities. Secondly, we believe that the war has already made more than enough demands upon the young generation. It would be mere vengefulness to exact further obligations—and unnecessary, unjustifiable ones at that—of these young men. And then: If amnesty is intended to gain the return of these men to our—their—society, the fact is that they view "alternative service" as punitive, and they simply reject the notion that this country and this government are in a position to punish those who have refused to become personally responsible for the brutalities, the killing and the destruction in Indochina. They will (and do) disavow any amnesty that seems to punish them for their acts of moral courage and human compassion. Further, we believe that it is constitutionally extremely dubious to deprive persons of their liberty to arrange their own lives except by reason of extreme national emergency (which alternative service would not be designed to meet) or in punishment for a crime—but the very purpose of amnesty is not to punish but to restore national harmony to a country deeply torn by war. Nor is it really very likely that socially constructive work would be accomplished by a system of forced labor. If our hospitals need staffing, our strip-mined hills need restoration, or our inner cities community planning, these urgent human and social needs can hardly be met by a labor corps of conscripted and therefore unwilling men. And the agencies of government have not shown themselves especially skilled at channeling large numbers of people into tasks of social reconstruction—bureaucracy is simply not the proper setting for such work, as the problems of the Peace Corps or VISTA plainly teach us.

The War in Southeast Asia has wreaked havoc in Asia and in our own society. In a very real sense, all people affected by the war are its victims—Asians and Americans, the soldiers and sailors and airmen, those who were killed or injured, the veterans, the prisoners and the exiles alike. One step toward overcoming the tragic consequences of the war in American society and

toward seeking that reconciliation that we need in order to tackle the gigantic social and economic problems of race and poverty is a broad, plenary and unconditional amnesty for draft resisters and deserters and all those who have suffered the war's legal disabilities. Amnesty would demonstrate that America is still capable of a communal moral act, after the appalling experience of the war. The healing and reconciliation of the nation, its redirection toward peace with itself, will be difficult enough. Let all of our country's sons return to join freely in the making of a better America.

Mr. SCHWARZSCHILD. For over three centuries, America has been the place of refuge for the political exiles and refugees from religious and political oppression. It is one of the unprecedented consequences of the war in Indochina that America has now produced, for the first time in its history, a large class of American political exiles, refugees, and prisoners of conscience. These men, numbering probably well in excess of 100,000, are of the young generation of Americans. They have had to confront in the most painful fashion the dilemma of deciding whether or not directly to participate in a war that the overwhelming majority brought to an end. The revulsion against this war is now almost universal in our society and in the world, and even from the very beginning of American involvement the Nation has been deeply divided over the merits of this war. No wonder, then, that so many thousands of young men, of whom their Government demanded that they do the killing and the being killed in a war which they could not support, that was unpopular and undeclared, refused to participate in that cruel war in Southeast Asia. Some refused to submit to the draft, some, once inducted, left the military service on their own, others went underground or into prison or into exile or into military stockades, and still others rebelled against the dehumanization of the war and of military life that they were expelled from the armed services and given less than honorable discharges. While men of our generation dispute the merits of the war and the blame for it, the burdens of the war will be the lifelong inheritance for these young men, and they alone will bear the legal consequences of a war that began when they were not even old enough to vote—unless, that is, this Nation decides to end this war and to bring about a reconciliation with those of its young sons who could not participate in this tragic and destructive episode of American history, by extending to them a broad, plenary, and unconditional amnesty.

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tary conflict in which the United States has been engaged has been followed by an amnesty, by a governmental exercise of the power not to prosecute those who for political or moral reasons came into conflict with the laws. In 1795, President George Washington granted a "full, free and entire pardon" to those involved in an insurrection in Pennsylvania against the United States. In explaining this to the Congress, President Washington said, "For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity and safety may permit."

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Amnesty, I want to emphasize, is not identical with pardon. It is distinguished from pardon in two significant elements. A pardon affects a single person, while amnesty extends to a whole class of persons, and where a pardon forgives a past offense, for which punishment is remitted, amnesty is "oblivious" of certain acts, a sovereign declaration that the best interests of society as a whole will be served by dismissing the question of any possible culpability. Amnesty is not a finding of criminal conduct and the remission of penalties, but rather it extinguishes the interest of the law in the acts amnestied.

We urge that amnesty be enacted promptly as the war is brought to an end.

Senator KENNEDY. What do you mean, as the war is brought to an end?

Mr. SCHWARZSCHILD. Upon the ending of the war.

It's hard to believe that this war, which the people want ended, which the President and the administration talk about ending but which is still being pursued by an escalated air war and by indige-

nous troops trained and supplied by us, can long continue. It is not too early then to consider, debate, and resolve the issue of amnesty, along with other great issues of the war and the immediate future of our country.

We urge that amnesty be extended broadly, that is, alike for draft refusers, for deserters, for exiles living abroad, for men convicted by courts-martial, for those serving sentences in prison, for those who have already served their sentences, for those who have been separated from the service under less than honorable conditions, for those who saw disavowal of their citizenship as their only way out, and for civilian acts of protest and opposition to the war.

Senator KENNEDY. What about stealing, or any of the other crimes?

Mr. SCHWARZSCHILD. In my prepared statement, I make a special exclusion for acts of violence, for acts of substantial injury to persons or property, which clearly validate a specific examination on a case to case basis, but otherwise, we believe, and I shall briefly allude to hereafter, that a case by case examination of the motives, and even specific acts, which were impelled by those motives is improper in the whole futile exercise of governmental agencies.

An amnesty that would cover only draft refusers, as some propose, would compound the inequities already visited upon the young generation by the war and the draft. By and large, the middle class, white, well educated were spared from the military service—they found shelter in the reserves, in college deferments, and in conscientious objection. The disproportionate burdens of fighting this war have fallen upon the poor, the less well educated, the black and other minority groups. But the same qualities of good education, middle class and white race in a general way also characterize those who refused to submit to compulsory military service and went to prison or into exile or underground. It is again the poor, the less educated, and the members of minority groups who contribute a much larger proportion of the deserters, of those who submitted to induction and became aware only in the military of the cruelties and the irrationalities of the war.

It is these men, too, who have been tried by military courts for various offenses who have been given less than honorable discharges.

It would be outrageous if amnesty, too, were to become an instrument of class and race discrimination, as are in effect so many other institutions and actions of our society. The circumstances which impelled these as well as those to draft refusal or desertion are the same: the war and the draft. And the motives were usually the same: a refusal to submit to the machinery of the war, whether for religious, moral, ideological, or personal reason. All acts and failures to act, we urge, that arose out of the war, that would not have occurred but for the war, and that might be subject to criminal penalties, should be included in amnesty.

We urge that such an amnesty ought to be plenary: that is, it should automatically cover all the classes referred to, without a case-by-case examination of the motives that prompted the acts or failures to act that are to be amnestyed. To begin with, it is in the very nature of amnesty that it extend to classes of political acts, not

to singled-out individuals. Equally important is the need to avoid putting these young men through an investigation of their conscience, their religious training or beliefs, their bona fides, and demanding that young men who are not yet or barely out of their teens be able to articulate a system of beliefs, a Weltanschauung, that will satisfy administrative or judicial bodies of the Government.

We urge that no conditions whatever attach to the amnesty granted and that neither alternative nor national service nor any formal declaration be required. In the first place, the deserters and draft evaders have already suffered the pains of prison or exile or underground life, to say nothing of the fears and risks of the lonely decision to resist the awesome power of the U.S. Government and its instrumentalities. Secondly, we believe that the war has already made more than enough demands upon the young generation. It would be mere vengefulness to exact further obligations—and unnecessary, unjustifiable ones at that—of these young men. And then: if amnesty is intended to gain the return of these men to our—their—society, the fact is that they view alternative service as punitive, and they simply reject the notion that this country and this government are in a position to punish those who have refused to become personally responsible for the brutalities, the killing and the destruction in Indochina.

The war in Southeast Asia has wreaked havoc both in Asia and in our own society. In a very real sense, all people affected by the war are its victims—the Asians and Americans, the soldiers, and sailors and airmen, those who were killed or injured, the veterans, the prisoners and the exiles alike. One step toward overcoming the tragic consequences of the war in American society and toward seeking that reconciliation that we need in order to tackle the gigantic social and economic problems of race and poverty is a broad, plenary and unconditional amnesty for draft resisters and deserters and all those who have suffered the war's legal disabilities. Amnesty would demonstrate that America is still capable of a communal moral act, after the appalling experience of the war. The healing and reconciliation of the nation, its redirection toward peace with itself, will be difficult enough. Let all of our country's sons return to join freely in the making of a better America.

Senator KENNEDY. Fine statement.

Mr. Gaylin, I was interested, you talked somewhat earlier about the conversations you had with a number of prisoners.

What do you detect is their attitude about amnesty for those who instead of going to prison, went into exile?

Dr. GAYLIN. They are extremely nonmoralistic, or nonaccusatory of those who chose not to go to prison.

They identify with them. They have a kind of compassion I wish existed in the older generation; and they accept them as fellows in the same cause.

One thing I am concerned about—

Senator KENNEDY. You mean the older generation, at least the fathers of those who say, "Well, my boy went to Vietnam and therefore we're not going to let some other kid that didn't go get away with it?"

Dr. GAYLIN. Yes.

Although often it is not a father whose son went to Vietnam that says that.

One thing that concerns me, if I may ask a question, is there has been a great deal of talk about whether it should happen when the war ends or before—the timing. And I'm a little bit concerned with the war that had no beginning, how are we going to define its end?

For instance, when I hear the President talk politically, he talks as though the war were ending. Yet today, when I heard representatives of his Justice Department or the generals, they talk as though the war had an extended period to go.

I'm a little concerned about how we are going to define the end of this war, so that we may get on with the business of amnesty.

Senator KENNEDY. Well, I suppose the President mentioned in his interview with Dan Rather that his definition for the end of the war is when the prisoners of war are returned. And I guess you would use that as the time.

I wish I could be a lot more sanguine about when that was to be.

Let me ask you, is your position the unconditional amnesty at the present time?

Dr. GAYLIN. Yes, it is.

I presume the amnesty is for the conditions we've talked about, and I again see no particular difficulty with exempting the specific things; to do what's been suggested, to go on a one by one basis, and here's the analogy of World War II, I think it would be catastrophic.

Senator KENNEDY. As long as you still have this Selective Service System operating now, a boy's number comes up, and he just goes over to Canada, he picks up his unconditional amnesty and comes back, and goes right back to his job.

Dr. GAYLIN. Then I would say a number of things. We would have to examine whether we have to have someone whose number comes up again, if we're thinking of true justice in this larger number, whether this has to be, at this point, with a war that is winding down.

We have to really reexamine that question as maybe this may be a necessary spirit of the reexamination of that question, because I do agree that would create a problem.

Senator KENNEDY. If you didn't have the draft, the logic of the argument follows a good deal more closely.

Dr. GAYLIN. It may be indeed an argument, not for postponing amnesty, but for hastening the end of the draft.

Senator KENNEDY. Senator Hart.

Senator HART. The statements all have been excellent and helpful. Thank you.

Senator KENNEDY. As Senator Hart pointed out, even when you were reading through these statements, there was an awful lot of material going by very fast, very well stated. So, I want to tell you how much we appreciate your appearance here.

I want to thank you all very much for being with us this afternoon.

Our final witness, Mr. Charles O. Porter, Eugene, Oreg., former Member of Congress, former White House staff member, chairman of the National Committee for Amnesty Now.

Mr. Porter, it's nice to see you again. It's been a few years.

Mr. PORTER. Thank you, Mr. Chairman.

With the permission of the Chairman, I have a statement that Senator Morse, former Senator Morse, gave to me to file with the committee on this subject, and he wanted it incorporated in the record.

(The statement referred to follows:)

POSITION STATEMENT BY WAYNE MORSE—CAMPAIGN 1972—U.S. SENATE
AMNESTY

Some form of general amnesty legislation should be passed. The Vietnam war has created deep divisions among the American people. Most of those who once supported the war now believe it should be ended so that Americans can turn their united efforts toward the improvement of their lives here at home. An important step toward ending the mistrust and divisions caused by the Indo-China war would be a general amnesty for all those who violated the Selective Service law, or who left the United States because of their opposition to the war. They made clear that their refusal to serve in the war was because their conscience, based upon moral conviction, would not allow them to participate in it.

The National Committee For Amnesty Now is currently drafting proposed general amnesty legislation to be presented for hearings and possible modifications during this session of Congress. This bill provides a general amnesty for those Americans who refused participation in the war in Indo-China, or for not participating in the Armed Forces since August 4, 1964 except where significant personal injury or substantial property damage to others was caused.

It should be understood that the bill which is being prepared by the Committee For Amnesty Now is not a final proposal, but is to be introduced for full committee hearings in the Senate where it will be subject to whatever modifications the record of testimony submitted to the committee justifies. I shall support a general amnesty law that results from such Senate hearings if it carries out the objective of restoring full citizenship rights to moral conscientious objectors against the Vietnam war.

When I was in the Senate, I offered amendments to the Draft Law that would provide the same exemptions to moral conscientious objectors, who in good faith claim they cannot go to war on moral grounds, as exemptions are given to religious objectors. If such legislation had been passed, or should be passed now by Congress, it would serve as a legal basis for granting a general amnesty to those who have been imprisoned or who have fled the country because of their moral objections to being drafted for military service in an undeclared Presidential war. Such an amnesty would not include those who committed felonious violence to people or acts of substantial destruction of property.

A general amnesty would help unite our country and bring back into full citizenship nearly 100,000 young men who are now exiles from the land of their birth, and many thousands of other young men who are languishing in American jails and prisons. They are there because of their moral conscientious convictions against fighting in an undeclared Presidential war, which in no way has involved a threat to our nation. Practically all of these young Americans would have rallied immediately to the defense of our nation if our country had been attacked from without and its security threatened.

America has a record of being remarkably generous to friends and allies abroad. America has restored her enemies of World War II to prosperous and competitive nations. It is time we extend unconditional generosity to those of our own young men who followed the dictates of their conscience by refusing to fight in what they consider to be an illegal, immoral and unjustified war of aggression in Asia.

One of America's finest traditions is the protection and nourishment of religious and moral conscience on the part of those within our citizenry who in good faith disagree with policies which violate their conscience. At the end of the Civil War which, like the Indo-China war divided country, families and friends and left a legacy of deep conflict and misunderstanding throughout our nation, Abraham Lincoln raised the standard of forgiveness as a great moral principle for re-uniting our nation.

He spoke his historic plea for unity in these words:

"With malice towards none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we're in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow and orphan . . . to do that which may achieve and cherish a just and lasting peace among ourselves and with all nations."

This great teaching of Lincoln should be followed today in binding up the wounds of our nation created by the Vietnam war. Those who served in it, and their families, deserve to receive from our country all the care and assistance suggested by Lincoln's great statement. Likewise, if we are to have a united country again, those who for reasons of conscience based upon deep conviction of opposition to our country's military intervention into Indo-China, should be brought back into our American family with restored rights of citizenship through the granting of a general amnesty law.

Mr. PORTER. Because of the excellence of the testimony and the questioning, I will skip certain paragraphs.

STATEMENT OF MR. CHARLES O. PORTER, EUGENE, OREGON, ATTORNEY, FORMER MEMBER OF CONGRESS, FORMER WHITE HOUSE STAFF MEMBER, MAJOR (AIR FORCE, RETIRED), AND CHAIRMAN OF THE NATIONAL COMMITTEE FOR AMNESTY NOW

Mr. PORTER. These hearings have clarified the issues in a way that needed to be done. I'm sure they are going to have far-reaching effects.

Amnesty, general, unconditional and immediate, is the threshold issue in the 1972 presidential and congressional campaigns. The granting of real amnesty will mean that this Nation, through its elected representatives in the Congress or through its President, has taken the next necessary, logical step towards healing our bitter internal divisions.

The administration and, according to the polls, most citizens now believe the Indochina war to have been a mistake. It follows that our policymakers who led us there, kept us there, and still keep us there, were and are wrong and that the young men who broke our laws resisting the war were right.

Last week in western Canada several American exiles, representing various exile organizations, made it clear to me that far more than amnesty for themselves they wanted the killing of Asians by Americans to stop. They denounced the U.S. bombing attacks.

Stopping this shameful war can be hastened by promoting support for general amnesty. The chances that our leaders will one day again embark on such a self-righteous, arrogant and ill-advised venture will be vastly reduced if we restore full legal rights to the more than 200,000 young men who broke our laws in protesting or not participating in the Indo-China war.

The war needs a new focus. The troops are coming home. The draft is all but inactive and is on its way out. This chapter of U.S. history must not be closed without a formal, national judgment that our government was wrong. The tired, empty justifications have all been repudiated. Communism was not about to engulf our allies, nor the United States. Our commitments did not bind us to fight a war. South Vietnam's self-determination was not at stake. We were not protecting our boys. And the way to get the prisoners of war home is to stop fighting and get out of the area.

As the war, we hope, grinds to a conclusion, we cannot shrug off its immoral nature and leave its characterization as such to the rest of the world now and to our historians 50 years from now. We don't do that if we want the unity that only realization, repentance, rededication and reconciliation can bring through the national debate that must precede the granting of a general amnesty, and that debate has begun in earnest in this room in the last few days.

The issue is not whether or not to grant amnesty to war resisters. It is between granting the real amnesty that will bring us together again and the granting of the limited, conditional amnesty endorsed by President Nixon and substantially embodied in Senator Taft's bill.

A copy of the draft of the legislation proposed by the National Committee for Amnesty Now is attached to this statement. I understand the purpose of this committee—and I might say we do incorporate the Administrative Procedure Act as part of our bill. A number of Congressmen and Congresswomen have assured me in the last few days that they are going to introduce a bill which will contain the main features of this bill.

I think there will be legislation filed in the House of Representatives soon. Chairman Celler yesterday assured me that he would look favorably toward having hearings over there.

This proposal, which is still subject to improvement, includes three features which we believe to be essential:

First, amnesty is granted by our proposed legislation to every person who violated laws in protesting or not participating in the Indochina war, not just to the selective service law violators as in the Taft bill. Our amnesty is universal and automatic except where significant property damage or substantial personal injury was caused to others. In those cases an Amnesty Commission will decide.

From the DOD representative we had some figures about the number of military deserters. The Department of Defense told this committee that there are 30,000 military deserters now. I've tried to get good figures. I know that the figures of the New York Times and Newsweek and others which they've got from about the same sources I've been trying to get them, have different figures. I suggest that the DOD has had problems with the accuracy of other body counts in other continents. Perhaps their body count there could also be as grossly inaccurate.

Certainly, as the Senator pointed out, the study they made about deserters was based on those who came back, and not on those who stayed away; so that 4.1 percent figure is suspected. Dr. Gaylin also indicated that it is probably not one that should be relied on.

But regardless of the number, the principles are still the same.

Second, ours is nonpunitive and with the stated purpose of being a first step towards reconciliation and recompense for war resisters. The Taft bill requires 3 years of alternative service at minimum pay rates.

Third, ours becomes effective upon enactment, as does the limited Taft bill, but President Nixon and Secretary of Defense Laird want to wait until the war is over, the prisoners returned and the missing in action accounted for.

General Benade testified after the requirements for Vietnam have been met we should consider amnesty for desertion. That was an ominous thing for me to hear, because, as I reminded him in a break, that the Commander in Chief has told us we are withdrawing from Vietnam. I think that our troop requirements in Vietnam have passed at this point, unless the White House has perhaps a different policy than the one that has been enunciated.

While Senator Taft deserves thanks for his attention to this vital issue, his bill is defective in several respects: It misplaces the blame by requiring penance from the war resisters, not the policymakers. Almost all war resisters, in this country or in exile, will refuse to accept any such penalty for doing what they thought was right and what now, after the Calley trial and the Pentagon papers, most Americans have come to realize was right.

Senator Taft when he introduced the bill spoke of the 70,000 young exiles living in Canada. And I know up there people like Bob Gardner of the committee and Council of Churches, that's the figure he uses, and he's been up there for more than a year, working with them.

And he uses a figure of that size, and yet the Defense Department tells us there are only 30,000 deserters in all and it's hard to reconcile those figures.

Apparently Senator Taft did not realize that about two-thirds of them are not draft-resisters, the only ones affected by his bill, but deserters from the U.S. Armed Forces. If, as the Senator says, "we, as a nation, are so wise, strong and charitable as to offer them, the draft resisters, an opportunity to be reunified with American society," we ought not to make any distinction between a man who was in the service and another who was not. At what point on the road to Damascus these Sauls saw the light about this war is not significant. Many men indeed fought in the war and later concluded they had been deceived and ill-used by their government.

If, by some miracle, the war dead—white, black, or brown—could be brought back to life, the wounded healed and the maimed made whole, it would be done instantly. The war resisters entitled to amnesty do not deserve punishment. Most have had their lives drastically dislocated. Most have suffered the anguish of the dilemma between obeying the law or their conscience. The time for amnesty is now, not at some indefinite date in the future.

But, some ask, is amnesty fair to the 3 million men who served in Southeast Asia, some fighting, some dying, some wounded? The most direct answer to that question can be given by the veterans themselves. I have found that almost always these veterans favor general amnesty. They understand that this war, bad as it was and is, could have been, and yes, could be, ten, a hundred, even a thousand times worse.

That our nation turned 180 degrees from a massive land war in Asia must be credited, in large measure, to the young men who resisted, who balked, who listened to their consciences who said, "Hell, no, I won't go," and instead went to prison, went underground or left the country. Their examples made a shocking impression on their relatives and friends. They woke up this country as no speeches, articles or books, or demonstrations did.

In all fairness to all of those who did make speeches and write articles and books, we also had some part in educating these young men, but they are the ones that took the step.

This is the answer to the related question: "Is amnesty fair to the parents of sons who died in Vietnam?" Such sacrifices cannot sanctify an unjust war, but they can be of lasting value if they help end such wars once and for all. If the young war resisters had not dared to break our laws, many more parents would have been, and would be, mourning the loss of their sons.

This was unique in its scope and breadth. So are the dimensions of the proposed amnesty. Both have no precedents. We pray both will have no successors. A bad war calls for a good amnesty.

I brought one of our "Amnesty Now" bumper stickers here. The committee may recall that for a brief while the President used that slogan, "Bring Us Together"; but we felt that he hadn't used it so much so that it was used up. We intend to use it as the slogan for our campaign for amnesty now.

Amnesty stands at the threshold of the chief issues of the 1972 campaign: No more war but jobs for all. Peace and jobs. A society where we fight poverty and pollution instead of persons not aptly designated as enemies; where we build instead of destroy.

Former Senator Wayne Morse, the honorary chairman of the National Committee for Amnesty Now, told me last August when we launched this organization that amnesty was one issue on which the American young people were unanimous, firm, and unyielding. Candidates for Congress and the Presidency will take heed.

Our Nation's character was and is blemished by this misbegotten war. America teeters on the threshold of her third century as an independent democratic republic, still strong but not so proud. The bitter divisions fostered by the war can only be diminished by the granting of general amnesty, unconditional and immediate.

These hearings, for which Senator Edward Kennedy deserves our sincere thanks, will encourage the burgeoning national debate on amnesty as the vehicle for characterizing this war as a mistake, at last ending it and the possibilities of other wars like it, and making it possible for law-breaking war resisters to be called and welcomed back to full citizenship.

America needs these young men. Their courage of conviction places us all in their debt. It will be a glorious day for us and for them when their full legal rights are restored by Congress and they are once more able to contribute directly to America's goals of peace, meaningful jobs and liberty and justice for all.

Senator KENNEDY. Thank you very much.

Senator HART. Thank you very much.

I want to say what my chairman would kick me in the shins for if he were close enough to get to me before we close.

You concluded your prepared statement by thanking Senator Kennedy. That's what I want to do as we close.

Mr. PORTER. I wanted to thank you too.

Senator HART. No, no.

The chairman of this committee has developed in these 3 days the source materials from which those who are uncertain and, indeed,

some of those who are certain about how we should handle this problem, can turn, and develop informed answers.

This record clarifies the elements and issue and competing claims, and seeming conflicting principles that are at work.

I want to thank all of those who testified, but most of all, Mr. Chairman. And I mean this without any if's, and's, or but's. I want to thank you for giving me and others the opportunity to hear what I have heard.

You have been identified as a man of compassion, based on many actions; some more dramatic than this. But in the long haul of history's judgment, I sense that your willingness to move us into this volatile area will be perhaps underscored more to a degree than we even realize now.

I have in a sense wobbled all over the lot on this question. I have been for amnesty, but what about now; how do you handle the fellow that has demonstrated his dismay and despair by blowing up a building, and all of these other things.

But you have helped me, and you've helped a lot of people. Thank you.

Mr. PORTER. May I say, I concur with the Senator from Michigan. These hearings are of vast importance.

[Applause.]

Senator KENNEDY. The subcommittee stands in recess.

(Whereupon, at 5:30 o'clock p.m., the subcommittee recessed).

(The following additional statements and correspondence were submitted for inclusion in the hearing record:)

RESOLUTION OF PAST COMMANDERS OF THE AMERICAN LEGION

RESOLUTION

Whereas, a growing variety of organizations, including the National Council of Churches, the American Civil Liberties Union, and the radical War Resisters League, are pressing for amnesty for the young American fugitives from the war, and

Whereas, bills have been proposed in Congress to clear draft dodgers, slackers and cowards who have fled to Canada, Sweden or to other Countries around the world to escape their duty to their country, and

WHEREAS, a few statesmen on the national level are urging that the slate be wiped clean, and that there should begin a task of national reconciliation which would permit more than 75,000 of these draft dodgers and deserters to return to the United States and to resume their respective peace time courses in civilian life; Now, therefore, be it

Resolved That this Association of American Legion Past Commanders, in regular meeting assembled at Rancho Bernardo San Diego, California on this, the twenty-first day of January, A. D., 1972, protest the granting of any amnesty, under any circumstances, to any or all of these draft dodgers or deserters, each of whom made his own choice when he elected to abandon this country in time of peril. Be it further

Resolved That a copy of this Resolution be transmitted to the President of the United States, to the Department of Justice of the United States, and to all members of Congress who are presently representing California in Washington, D. C.

Done at Rancho Bernardo, California, on January 21, 1972.

Attest:

ALFRED W. STELLE,
Secretary.

ROY ROSENBERG,
Chairman.

STATEMENT OF GORDON D. LAPIDES, CHAIRMAN, BAY AREA SELECTIVE
SERVICE LAWYERS PANEL

The Bay Area Selective Service Lawyers Panel is a group of over 100 lawyers who have represented literally thousands of young men before the Federal courts, military tribunals and Selective Service System. San Francisco and the Bay Area have been the center of the movement of resistance to the draft and the Viet Nam war since that conflict began to leave its searing mark on the American conscience. Many of my colleagues on the Panel have taken time from busy law practices to give counsel and defense to young men who have chosen the difficult road of resistance to that tragic conflict. The young men that we have seen pass through our offices and before the courts have varied in their education, their ability to express their views, their religious belief or lack thereof, as well as their political sophistication. They have come from all strata of society. Some were strongly confirmed in their belief, others were very confused. All held in common, however, the conviction that they would not abet the senseless slaughter in Viet Nam and all had the courage as well to stand by that conviction.

Again and again, one would hear articulated the dilemma of a young man placed in a position of transgressing a "law" no matter what he did. On the one hand, complicity in the Viet Nam conflict was variously pictured as a violation of the precedent of Nuremberg, of the Geneva accords, or simply of that

private law of conscience of "natural law" which lies at the very heart of the American ideal. On the other hand, the written law of the country seemed to require otherwise. In the eyes of these young men, the human and moral consequences of their actions demanded that they refuse to participate.

The choice these young men had to make was a hard and lonely one. At first, few found support among their friends or parents for their stand. Their choice often meant not only a break with the law but a break with their family as well. Few, if any, allowed themselves to think about the possibility of amnesty from a Government which was so ardently pursuing what they perceived to be a morally disastrous course. Some escaped the clutches of the law, some did not, and some fled the country. But all of these young men, and many more like them throughout the country, were marked by this conflict in a way that will remain with them all their lives.

It is argued that provision was made in the law for young men of conscience to qualify for a conscientious objector deferment. But in reality such deferments were often refused to men who clearly qualified for them. Others could not obtain them because their objection was a selective one, directed only to the conflict in Viet Nam. Many more, often of the lower and least educated classes, and perhaps the largest group, could not even articulate why they could not serve, but could only struggle to make that choice with which they could most easily live.

The time has now come to meet the question of amnesty for the young men made criminals, outlaws and refugees by this horrible conflict. As the country comes to its senses regarding Viet Nam the Government must move to heal the breach created by this horrible conflict by extending the hand of amnesty.

LETTER WITH ENCLOSURES FROM MICHAEL C. BROPHY AND MARC
MAYERHOFF, UNIVERSITY OF WISCONSIN (FEB. 24, 1972)

DEAR MR. SCHNEIDER: We have just learned from Joe Tuchinsky of M.C.D.C. that you have requested information relevant to the appearance of Curtis Tarr before Senator Kennedy's subcommittee on February 28, 1972.

The following information which we hope will be relevant to the hearing is based upon four years of experience in Military Service and Selective Service (Draft) Counseling. The purpose of the Office of the UWM Military Service and Selective Service Counselor is to collect, understand, and disseminate all lawful information with regard to the programs and opportunities in the armed forces as well as the policies and procedures of the Selective Service System toward the end of helping men to reach an affirmative decision with regard to the national service obligation.

During the past four years between 6,000 and 8,000 men have been counseled in this office individually, and multiples of that number have been provided with accurate information concerning the national service obligation. The UWM Military Service and Selective Service Counselor is an ex-police officer and a veteran with an honorable discharge.

Information which may be relevant to Senator Kennedy is included under three headings. Enclosures referred to in the context are included with this document. Documentation and citations for conclusions implied may be lacking due to the lack of time necessitated by the short notice of the hearing. It is available if you wish to call or write.

AVAILABILITY OF INFORMATION FOR REGISTRANTS OF THE SELECTIVE SERVICE SYSTEM

Negligence on the part of the SSS effectively denies registrants access to accurate information needed to make intelligent and affirmative decisions concerning the national service obligation. Under the new regulations men are forced to turn to local board clerks, who are hired under civil service for their clerical skills rather than their knowledge of selective service law. There is no official training program in spite of the fact that they are expected by registrants to have detailed knowledge concerning an extremely complex body of law.

In the absence of accurate information from an official source, many men turn to irresponsible draft advising operations. These organizations are less interested in helping a man to reach an affirmative decision, consistent with his

conscience than in haranguing him with rhetoric intended to coerce him into a position of resistance or emigration. This last statement is in no way intended to serve as an indictment of the vast majority of draft counseling centers in the United States. However, there are some irresponsible individuals who practice ulterior motives behind the screen of providing draft information. This is made possible by the void left in this area by the federal agency responsible for originating the information. The psychological damage done to so many men by this practice is made possible from the criminal negligence of the Selective Service System in this area of providing accurate information.

For the vast majority of male citizens of the United States, the Selective Service System is the first agency of the federal government with which they come into direct personal contact. A negative experience with this institution generalizes to include the whole structure of government. If one were to define the organization which was most responsible for alienation of young people from the political process during the 1960's it would come closer to a definition of the SSS rather than SDS.

Ready availability of accurate information is the first rule of due process. Without due process democracy does not exist. At best one can expect benevolent despotism from such a system, at worst tyranny. The SSS represents a tendency toward tyranny. If the Internal Revenue Service gave out as little accurate information as does the Selective Service System, there would be a revolution in this country within a month.

Even if accurate information were made available by the SSS it is likely that the vast majority of registrants would be unable to understand it. The system by which liability for national service is determined is at the present time so complex in its ramifications for registrants in virtually every situation that it defies a concise and meaningful explanation. The draft lottery method for establishing draft liability, which was plugged in 1969 and 1970 by Dr. Tarr and others as a simplification of the draft process, is a nightmare of confusion. It lends itself to explanation only through an articulation of a myriad of very specific hypothetical situations. It might be interesting to ask Dr. Tarr to explain the draft lottery without using examples.

This inability to put the selective service law in concise meaningful language effectively discriminates against economically disadvantaged registrants. The system of justice in these United States is one in which the accused must pay the penalty before the verdict is rendered. The initial penalty is assessed when one discovers that to obtain equity one must hire an advocate. Most draft age males are economically unable to do this. No economically disadvantaged males are able to do this.

The quasi-judicial structure of the SSS demands that a registrant who wishes to effect the decision making process have substantial skills. Skills which are associated with the educational background of the economically advantaged. This is inconsistent with the "fair and just" intent of the law as articulated by Congress in the Military Selective Service Act of 1971.

The effective and proposed revisions of the regulations under the new draft law limit the sources of information available to the registrant even more severely than under the old law. A more objective and complete analysis of official sources of information for registrants is appended to this letter.

FORMS

The language in the forms used by the SSS is not understandable to most registrants. This is especially true for the registrant who comes from an economically disadvantaged background.

During November of 1971, Dr. Tarr released for comment a draft revision of the Special Form for Conscientious Objector (SSS Form 150). On November 16, 1971, one of the authors of this letter pointed out to Dr. Tarr that a high level of reading skill was needed to understand the word content of the form. On November 19, 1971, Dr. Tarr replied that the SSS would take comments "into account as we wish to work on what can be a form helpful to the members of our local boards and to registrants alike." (See enclosure.) Subsequently this proposed revision was withdrawn from consideration.

On January 12, 1972, a second proposed revision of SSS Form 150 was published in the Federal Register for comments prior to promulgation. Applying the same two readability formulas used to evaluate the first proposed form, we

determined that at least college level reading skill would be necessary to understand the content of the form. This information was sent to the National Headquarters of the SSS. A reply has not yet been received.

The second study also shows the grade equivalent reading level for the pamphlet "CO" and the Special Application for Conscientious Objector Presently in use. The results for these documents are barely congruent with the reading level of the majority or registrants.

Evaluating the public information materials of the SSS according to readability formulas is particularly important at the present time. Officials of both the SSS and the Department of Defense have indicated the desirability of attracting younger men for service in the armed forces. This undoubtedly means that the draft will be focused on younger men in such a way as to increase the percentage of draft motivated volunteers from a younger age group than in the past. As this emphasis progresses the significance of an increasingly complex quasi-judicial system, complemented by forms and informational materials which are difficult to understand will compound the inequity of the selection method to an even greater extent than at present.

A good standard for readability of Selective Service materials might be taken from a random sampling of Army recruitment pamphlets for enlisted personnel. Putting this standard into law with appropriate safeguards would be one method of insuring the readability of Selective Service materials.

AMNESTY

Experience leads us to the conclusion that upwards of 90% of all of the men who are in Canada as the result of an effort to avoid the draft are there because they were unable to obtain accurate information and competent and responsible counseling. Many, if not most, are there because they misunderstood the alternatives which were open to them under the law.

The Selective Service System is directly responsible for this lack of information. The proof for this allegation is explicit in the materials distributed by the SSS during the Vietnam era.

Out of the thousands of men whom we have worked with, only one has emigrated in the four years this office has been open. Emigration has been represented as a live option to all of the men have worked through this office. The other five options in the forced choice context defined by the selective service law have also been represented.

Most men who were considering emigration chose resistance or civilian alternative service when educated as to the facts concerning those alternatives. Some who chose civilian alternative service discovered that they were entitled to a deferment or exemption classification.

Men who have emigrated to avoid the draft are not draft evaders. To evade is to avoid something by deceitful means. The draft evaders are in the Reserves and the National Guard, seminaries, and other educational institutions, in the teaching field, and some have disability deferments. A man who emigrates may do so to avoid the draft but he is not deceiving anyone by emigrating.

Many men presently in Canada are under the false assumption that they can be successfully prosecuted if they return. A file search by individuals competent to discover procedural error will discover a large number of men who are extremely unlikely to be prosecuted.

The Selective Service System and the Department of Justice could facilitate this process by indicating publically that they will cooperate with Military Service and Selective Service or Draft Counselors in these file searches. A correlation of lists kept by the various investigatory agencies involved, with those of the Justice Department, which indicate those emigrants who have already been charged together with a stipulation of the charges would also be helpful.

We hope that this letter and the enclosures are helpful to you.

Sincerely,

MICHAEL C. BROPHY,
UWM Military Service and
Selective Service Counselor,
M.S. Educational Psychology Counseling.
MARC MAYERHOFF,
UWM Assistant Military Service and
Selective Service Counselor.

Enclosures.

AVAILABILITY OF INFORMATION FOR REGISTRANTS OF THE SELECTIVE SERVICE SYSTEM

At section 1641.1 of the selective service regulations (regs.) it is indicated that every person (including registrants) "shall be deemed" to know the selective service law. Hence, under the regulations promulgating the Act it is solely the registrant's responsibility to know the law.

This regulation has not been edited to reflect the intent of Congress as indicated at Section 13(b) of the new draft law. Although the Conference Report on the new act is not clear on the intent of Congress in requiring the thirty day lead time on promulgation of new regulations, it would appear likely that the goal of this new section of the act is to give the registrant some advanced notice of changes in the law.

Information is presently provided by the SSS to registrants as a result of the following official mechanisms of the Selective Service System:

1. *Press Releases*.—The public information policy of the SSS is stated at 1606.61 of the regulations. It states that the "Selective Service System has a positive public information policy." Unfortunately, to consider this policy a guarantee of accurate information reaching the registrant is to assume that 1) the press releases from National Headquarters accurately represent the law and 2) the newspapers and other media will accurately represent the press releases. Both assumptions are highly suspect. A cursory review of current releases from the SSS leads one to the conclusion that the "Office of Public Information" at National Headquarters might be more appropriately named the Office of Public Relations.

2. *Forms*.—Under the current regulations the content of all forms is part of the selective service law (1606.51). Under the proposed regulations issued January 12, 1972, but not yet in effect, 1606.51 is revoked. Does this mean that forms no longer constitute part of the law? If so, does it also mean that they do not have to accurately reflect the law? These are important questions, as most registrants do not read the draft law except as it appears on the forms.

The issue of the high level of reading skill required to understand the forms is covered in the two documents enclosed with this statement.

3. *Local Board Clerks*.—The State Director has the authority to determine the number and duties of local board clerks (1605.31). Presently they attempt to answer questions of registrants. Our experience, with this policy, as a result of feedback from registrants, leads us to the conclusion that accuracy of information, which must be impeccable if there is to be equity, would better be served if local board clerks were directed not to answer the questions of registrants. Their day-to-day duties are primarily clerical and not such as to make them expert in selective service law.

4. *Executive Secretaries*.—Same as local board clerks.

5. *Medical Advisors to Local Boards*.—About the time some of them began to take their jobs seriously under 1628 of the regulations, they were effectively hamstrung by Local Board Memorandum No. 78 (as amended August 10, 1970). Like the few Government Appeal Agents who took an interest in the inequities inherent in the decision-making process of local boards, they too began to react to the procedures at pre-induction physicals.

6. *Pamphlets Distributed by the Selective Service System*.—The new pamphlets distributed by the National Headquarters in 1971 were poorly thought out and poorly written. They were at best confusing and ambiguous, and at worst misleading to the point of containing factual error. Also the content of these pamphlets requires an advanced educational background to understand them (see enclosure dated February 10, 1972).

7. *Advisors to Registrants*.—Under the Military Selective Service Act of 1967, two functionaries were provided to aid the registrant in his understanding of the law. One was the Advisor to Registrants whose duty it was "to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law (1604.51)." The second functionary was the Government Appeal Agent and his Assistant(s) who had a number of responsibilities. In our experience few of these responsibilities were carried out by anyone with those titles. Primary among those duties and responsibilities was to advise registrants and make recommendations to the local board, keep the local board informed of the changes in the law, and appeal on behalf of registrants when necessary.

On December 10, 1972, the position of Government Appeal Agent and Assistant Government Appeal Agent were terminated under the regulations promulgating the new law. This leaves only the Advisors to Registrants to help registrants to cope with an increasingly complex law. The intent of eliminating the Government Appeal Agent is clearly evident when one considers the number of Government Appeal Agents and Assistants who served, as opposed to the number of Advisors to Registrants left (see enclosure). Also, there is no stipulation in the regulations that the Advisor to Registrants should, whenever possible, be an attorney. To expect a layman to move into an uncompensated position and understand an extremely complex law is presumptuous.

The situation is further complicated by other factors. A letter dated June 2, 1971, Mr. Kenneth J. Coffey, National Headquarters Public Information Officer, stated:

"The training given to Government Appeal Agents, Associate Government Appeal Agents, Advisors to Registrants, Local Board Members and other personnel varies from state to state. There is no national uniform training for these people, but rather it is left up to the discretion of each state director to determine what he feels is appropriate."

If the implementation of the selective service law is to be "fair and just," as Congress intended, all men must have equal access to accurate information. We fail to understand how this could possibly be the case when the training of the above-mentioned personnel is different from state to state. This is compounded by the significant variations in the number of Advisors to Registrants appointed in each state, as shown on the attached table (see enclosure, letter from K. Coffey, June 2, 1971, p.2).

A continuing refusal to even try to develop uniformity in the dissemination of information is quite evident.

On June 16, 1971, a letter was sent to National Headquarters proposing the creation of two new positions, those of Coordinators of Advisors to Registrants. The duties of these officials, as outlined in the proposal, included training the Advisors to Registrants and helping the Advisors maintain current knowledge of the law. Among the potential goals described were the mitigation, as much as possible, of the conditions which led men to seek help from irresponsible individuals and groups and the increase of the chances that men would make decisions with which they would be satisfied later. The proposal was denied because, among other reasons, "the Director sees no reason to believe that further coordination at the level of National Headquarters would help the system" (letter of October 8, 1971 from Colonel Maxwell O. Jensen, Operations Division Deputy Manager, to Mr. Marc Mayerhoff). Selective Service was then asked if a need for such coordination was seen at the state level and replied negatively.

The initial proposal consisted of a cover letter and a two-page outline and included a statement that a more detailed report was available upon request. Selective Service chose not to learn more about the proposal before rejecting it.

Copies of the proposal and some of the subsequent correspondence are attached.

Additionally, changes in the regulatory material governing the operation of the Selective Service System are not available to the general public when they go into effect; rather, they are usually distributed several months thereafter. For example, this office received its copy of Local Board Memorandum No. 121 (Issued June 25, 1971) from the U.S. Government Printing Office last week, over six months after it went into effect. It is necessary to spend large sums of money on such things as the Selective Service Law Reporter to obtain the information. A second example is something which happened yesterday to the UWM Assistant Military Service and Selective Service Counselor. In an attempt to obtain a copy of the Selective Service Registrants Processing Manual (SSRPM), which went into effect unannounced in mid-January, he called the Office of Public Information at National Headquarters and asked for Mr. Kenneth J. Coffey. After being advised that Mr. Coffey was unavailable, he spoke to another person in the office. In spite of the counselor's statement that it was very important that he receive a copy of the SSRPM as soon as possible, he was advised by Mr. Coffey's office that it was only "half-published" as yet and that he should wait a few weeks before ordering it from the Government Printing Office. Eight weeks is the usual period between the ordering and delivery of materials from the Government Printing Office.

Clearly, Selective Service does not provide the information men need in order to "have notice of the requirements" of the law, as is prescribed under section 1641.1 of the regulations. On July 24, 1970, during his appearance before the Subcommittee on the Draft of the House Armed Services Committee, Dr. Curtis W. Tarr indicated that he was aware of this problem by saying, in part:

"There is another reason for making this information available, and that relates back to the point I made about draft counseling.

There is more of this going on all the time, and it is an honest attempt by conscientious people to help young persons make reasonable choices.

The more information we provide that is official, the better opportunity we provide for people who are trying to work creatively with young people. And the more we cut off the supply of valid information, the more we push them into the hands of those who will supply only the information that is appropriate to their cause." ("Review of the Administration and Operation of the Selective Service Law: Hearings by the Special Subcommittee on the Draft of the Committee on Armed Services, House of Representatives, Ninety-First Congress, Second Session," [Washington, D.C.: 1970], p. 12556).

Just before that, Dr. Tarr stated, "It seemed to me that when I first came into this office that there was no Government agency that did such a poor job of educating its clientele as did Selective Service." (*Ibid.*, p. 12553)

Nineteen months have passed since Dr. Tarr made those statements. His publicly stated goal of increasing the amount of information coming from Selective Service has not been met. We feel that this appendix points out sufficient evidence to support the conclusion that the goal has never been actively sought. All that has happened is the elimination of the Government Appeal Agent, the release of a few totally inadequate pamphlets, and the continuation, if not the increase, of Selective Service's disregard of its obligation to supply registrants accurate information about their rights and responsibilities under the law.

GOVERNMENT APPEAL AGENTS AND ADVISORS TO REGISTRANTS JUNE 1971

State	No. of Draft age men * *	No. of Local Boards * * *	(No. of G.A.A.- No. of AGAA) Total * * * *	No. of Draft- age men per GAA or AGAA	No. of Advisers per Registrant† * * * *	No. of draft- age men per Advisor to Registrants
Alabama	475,478	86				
Alaska	27,838	5*	(4-0) 4	5,222.0	2	10,444.0
Arizona	179,436	27*	(26-15) 41	4,376.5	109	1,646.2
Arkansas	258,021	78	(78-6) 73	3,308.0	150	1,720.1
California	1,931,909	144*	(121-67) 183	10,276.1	7	275,987.0
Canal Zone	2,472	2	(3-1) 4	824.0	3	824.0
Colorado	219,631	67	(68-6) 74	2,967.6	86	2,553.8
Connecticut	395,229	26*	(25-4) 29	10,525.1	84	3,633.7
Delaware	53,517	5*	(3-0) 3	17,839.0	9	5,946.3
D.C. (incl. LB100)	89,801	16*	(9-0) 9	9,977.9	15	5,986.7
Florida	597,768	68	(90-9) 99	6,038.0	267	2,238.8
Georgia	551,214	154*	(142-6) 151	3,650.4	46	12,224.2
Guam	9,293	2				
Hawaii	82,831	13	(13-6) 19	4,359.5	44	1,882.5
Idaho	91,314	45	not usable	n.u.	n.u.	
Illinois	1,146,056	217*	(193-49) 242	4,735.8	265	4,324.7
Indiana	561,348	155*	(147-30) 177	3,171.4	70	8,019.3
Iowa	335,526	104*	(98-8) 106	3,165.6	209	1,605.4
Kansas	257,226	84*	(81-14) 95	2,707.6	212	1,213.3
Kentucky	413,240	136*	(120-6) 126	3,276.5	46	8,983.5
Louisiana	461,173	89*				
Maine	118,931	17*				
Maryland	385,542	66*	(62-13) 75	5,140.6	82	4,701-7
Massachusetts	600,363	128	not usable		n.g.	
Michigan	960,934	134*	(133-51)	3,257.4	428	1,402.7
Minnesota	418,666	131*	(126-9) 135	3,101.2	25	16,750.6
Mississippi	327,774	90*	(87-8) 95	3,450.3	757	433.0
Missouri	499,792	140*	(133-20) 153	3,266.6	343	1,457.1
Montana	70,676	56*	(52-0) 52	1,359.2	n.g.	
Nebraska	165,943	96				
Nevada	39,931	17	(17-6) 23	1,736.1	15	1,662.1
New Hampshire	76,065	13*	(12-2) 14	5,433.2	58	1,311.5
New Jersey	725,417	49				
New Mexico	120,323	34				
New York City	849,026	68	(91-146) 237	3,582.4	1	849,026.0
New York (ExNYC)	1,078,348	92	137	7,871.2	204	5,286.0
North Carolina	653,631	101*	(99-3) 102	6,408.1	101	6,471.6

See footnotes at end of table.

GOVERNMENT APPEAL AGENTS AND ADVISORS TO REGISTRANTS JUNE 1971—Continued

State	No. of Draft age men	No. of Local Boards	(No. of G.A.A.- No. of AGAA) Total	No. of Draft- age men per GAA or AGAA	No. of Advisers to Registrants†	No. of draft- age men per Advisor to Registrants
North Dakota.....	80,677	53				
Ohio.....	1,157,235	134				
Oklahoma.....	239,700	83				
Oregon.....	221,936	32	(32-18) 50	4,438.7	182	1,219.4
Pennsylvania.....	1,273,542	176*	(173-247) 420	3,032.2	97	13,129.3
Puerto Rico.....	426,436	83	(83-17) 100	4,264.4	241	1,769.4
Rhode Island.....	92,773	11				
South Carolina.....	335,858	46	(46-37) 83	4,046.5	67	5,012.8
South Dakota.....	87,482	66			386	1,284.0
Tennessee.....	495,637	105*	(94-7) 101	4,907.3		
Texas.....	1,271,055	159			11	11,286.7
Utah.....	124,154	35*	(28-1) 29	4,281.2	23	2,188.8
Vermont.....	50,343	14	(14-1) 15	3,356.2		
Virgin Islands.....	6,412	2			249	1,432.3
Virginia.....	517,317	129*	(128-7) 135	3,832.0	66	5,492.6
Washington.....	362,509	30*	(29-47) 76	4,769.9	145	1,753.5
West Virginia.....	254,252	56*	(52-4) 56	4,540.2	4	118,773.5
Wisconsin.....	475,094	80*	(66-48) 114	4,167.5	44	913.5
Wyoming.....	40,194	23	(23-3) 26	1,747.6		

*More local boards than Government Appeal Agents (GAA).

**Source: Statistical Section Management Information and Statistics Office, National Headquarters, Selective Service System, "Registration and Classification of Selective Service Registrants," (Washington, D.C.; December 1970).

***Source: Dr. Curtis W. Farr, "Semiannual Report of the Director of Selective Service for the period January 1 to June 30, 1970 to the Congress of the United States," (Washington, D.C.; October 15, 1970).

****Source: Individual State Headquarters (April 21 to May 25, 1971).

n.g. figure not given by State Headquarters.

n.u. figure not given, but not usable.

† Several State Headquarters indicated that they considered local board members or clerks to be Advisors to Registrants

STATE HEADQUARTERS, SELECTIVE SERVICE SYSTEM.

Raleigh, N.C., April 28, 1971.

Mr. MARC MAYERHOFF,
Milwaukee, Wis.

DEAR MR. MAYERHOFF: This will acknowledge your letter of April 19, 1971, wherein you requested information as to the number of Government Appeal Agents, Associate Government Appeal Agents and Advisors to Registrants in the State of North Carolina.

It is a pleasure to inform you that we have 99 Government Appeal Agents, 3 Associate Government Appeal Agents, and all of our local board clerks serve as Advisors to Registrants.

I trust this is the information you are seeking.

Yours very truly,

WILLIAM H. McCACHREN,
State Director.

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM.

Washington, D.C., June 11, 1971.

Mr. MARC MAYERHOFF,
Milwaukee, Wis.

DEAR MR. MAYERHOFF: This is in response to your letter of May 19, 1971 relative to advisors to registrants in the State of Minnesota.

We have been advised by State Headquarters, Selective Service System for Minnesota that their letter of 22 April 1971, to you may have been misleading. There was no intention to imply that local board members were actually appointed in a dual capacity to serve as advisors to registrants as well as board members. There was no intention to imply that local board members were seeking to function as advisors to registrants. In the normal course of their duties local board members are frequently asked for advice pertaining to various selective service procedures and in such instances they are willing to provide information.

Sincerely,

WALTER H. MORSE,
General Counsel
(For the Director).

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM,
Washington, D.C., June 2, 1972.

Mr. MARC MAYERHOFF,
Milwaukee, Wis.

DEAR MR. MAYERHOFF: Thank you for your letters to the Office of Public Information.

The figures for total living registrants include all people who are registered with the Selective Service System dating back to World War II who are still alive. On page K-169 of "Registration and Classification of Selective Service Registrants," the V-A registrants are subtracted from the total living registrants to show the number of people under 26 plus those 26 to 35 whose liability is extended. The figure is not quite accurate because some men classified I-C and I-D may be over 26 and haven't yet been put into V-A.

The relevant question about the First Priority Selection Group is how many men pass through it, not how many are in it at any one time. The problem is complicated by the fact that about half of the men ordered for pre-induction exams fail them. Since we do not examine high numbered registrants, there tend to be more of them in First Priority than there are low numbered men.

To give an idea of the measurement problems, let us take the present First Priority Selection Group as an example. In January of this year there were about half a million in the group. By that time, most of the men with random sequence numbers up to 100 had been examined, so the pool was smaller by the men who failed the exams and were reclassified I-Y or IV-F. In the months after January, some men dropped out of school or dropped deferments and flowed into the pool. At the same time, others entered school and were made II-s, some were examined up to Random Sequence Number 150, and half of those were rejected, some enlisted or were inducted. As a result, at the end of March there were over half a million in the First Priority Selection Group, somewhat more than January even though 50,000 men had been inducted and more than that number enlisted. In April, the size of the pool dropped below half a million. In June, July and August however, the pool will grow as men graduate from school and are reclassified I-a. There may be up to half a million of these men, although some have already been examined and will be made I-Y or IV-F. The pool will then shrink slowly for the rest of the year.

How many men are in the pool? About 150,000 may be inducted with numbers up to maybe 170 or so (this is not a prediction worth acting on). Considerably more than that number will have enlisted, either as real volunteers or through the pressure of the draft. There will probably be over 700,000 men in I-A with numbers not reached at the end of the year. Approximately two million men turn 19 each year. About as many leave school as enter it. Thus somewhat less than two million men will have to face the First Priority Group in one way or another, although there will never be anywhere near that many men in it at any one time. Men who are deferred are not in the First Priority Selection Group. When they lose a deferment, they return to whatever priority selection group they were in before their deferment, which in most cases was the first.

The training given to Government Appeal Agents, Associate Government Appeal Agents, Advisors to Registrants, Local Board Members and other personnel varies from state to state. There is no national uniform training for these people, but rather it is left up to the discretion of each state director to determine what he feels is appropriate. Complaints may be filed with state headquarters if a civil service employee's work is considered unsatisfactory.

We regret that this Headquarters does not have copies of the "Selective Service Forms Manual" available for public distribution. However, it will be made available through the Government Printing Office following a review of new Selective Service forms which reflect the many changes in Selective Service processes. We cannot say at this time when the manual will become available to the public, although we expect it to be during this coming summer. In the meantime, if it is essential for you to have a copy of the present Forms Manual please let me know and we will xerox a copy for your use.

We hope that this information will prove helpful and appreciate your interest in the Selective Service System.

Sincerely,

KENNETH J. COFFEY,
Public Information Officer
(For the Director).

Enclosures.

LETTER FROM JACK COLHOUN, TORONTO, CANADA (FEB. 8, 1972)

DEAR SENATOR KENNEDY: I noticed a news item in the 8 February 1972 New York Times that your Senate sub-committee was planning to hold hearings "on Selective Service procedures and on the possibility of granting amnesty to draft evaders through administrative procedures" and that the committee would "focus especially on the World War II arrangements under which amnesty procedures were developed through administrative action alone."

As an editor of Amex magazine and the author of an article dealing solely with the 1947 Truman Amnesty, I would like to call your attention to my study and request that it be read at your committee hearings. Being a deserter, it is, of course, impossible for me to be there in person.

I would like to call your attention to my findings that the 1947 amnesty was highly unjust, pardoning only about 9% of those considered for amnesty. Moreover, the 1947 amnesty seems to have been predicated upon an individual's socio-economic class standing rather than upon criteria of justice. Today social class seems to be a crucial element in the draft resister-deserter phenomenon. For the latter point see my open letter to Senator McGovern in Amex; also refer to the New York Times' editorial on amnesty of 2 January 1972:

Social class is also an element. Most draft resisters and would-be conscientious objectors are college educated middle-class youths. Deserters tend to be less well-educated and more apt to act on their direct military experience, rather than on an understanding of their abstract rights. That factor needs weight in deciding their cases.

In regard to Selective Service procedures, kindly refer to an article published in the Sunday New York Times early this fall in the Week in Review Section in which you will find that one study of a Minnesota Selective Service Appeal Board achieved an average of 59 seconds per case regarding conscientious objection applications which had been turned down.

A case-by-case adjudication for deserters would tend to reinforce the present situation. It is nearly impossible to obtain an in-service CO. A martial environment militates against this but also a strong factor is that most deserters would be as unlikely to convince a civilian board of their conscientious objection. In order to present a cogent argument for CO status, a thorough and disciplined mode of thought is essential and this, in most cases, comes from higher education. College education is a luxury of which most deserters have not been able to partake. Consequently, any procedure, like that of the 1947 Truman amnesty, which requires a systematic set of beliefs as a prerequisite of being pardoned will be a process of gross injustice. Furthermore, the only grounds which the 1947 amnesty considered acceptable for pardon were religious objection to war; social-philosophical-political objections to war were not acceptable criteria. Clearly, the Indochina War has proven that these latter considerations must be included in any amnesty.

Thanking you in advance for your cooperation, I am,

Sincerely,

JACK COLHOUN.

STATEMENT OF VIRGINIA COLLINS, NEW ORLEANS, LA.

Amnesty is very necessary in this time of our history. As a result of the Vietnam conflict and the creation of mass hysteria by the few warmongers, the country is very much divided. Every American family has experienced some loss (imprisonment, exile, killed in action, etc.) in one way or another by this illegal war in Vietnam. In order to ensure that change which is inevitable in our time will be given some direction, it is incumbent upon this country to bring its citizenry together.

Amnesty is a political and legal instrument that can do this without a doubt. There have been many recent articles concerning it, presenting arguments pro and con, but most of them have dealt primarily with the superficial, not the in-depth nature of the political and legal applications.

Let's look at the definition for a moment. The root word of the term, amnesty, comes from the Greek (amnestia) meaning: to forget; to wipe the slate clean, unconditionally and completely. Thus, amnesia and amnesty result from a condition.

The polarity of this country, war hysteria, repression of Black and political people, urban unrest, inner-city conflicts, framed and unlawful arrests, such as: Angela Davis, Walter Collins, the Panther Party, the Republic of New Af-

rica, the Seattle Eight, the Chicago Eight, the Berrigan Brothers, and many other forms of repression are some of the problems that present a case for amnesty. By decree of the President of the United States, and also by act of Congress, amnesty is both political and legal.

To grant amnesty in our time in history will present a strong argument not only against the draft, the Vietnam War, and all wars, but will also present a strong argument for the beginning of decisive action toward freedom, peace, and a peace-time economy.

Those persons who were against the war, even before the publishing of the Pentagon Papers, are some of the best minds America has produced. But because of their action, they have been jailed, forced in exile, walked away from the Armed Services, or inhibited by lost of jobs or arrest for demonstration against the war, or other repressive action. There are more than a half of a million of people involved in one way or another. Of the 500,000 persons penalized there are at least 140,000 AWOL soldiers and "so-called deserters," at least 100,000 men who failed to register for the draft or went to Canada and Sweden and other countries, 35,000 convicted in draft cases, an untold number of soldiers disciplined for anti-war activity, 200,000 people, young and old, arrested and imprisoned or fined for marches, demonstrations, and mobilizations against the war, and hundreds indicted or convicted for civil disobedience.

Many people believe that there is no precedent for such an amnesty; but there are several parallels which we can refer to in which the United States was involved. The State of Utah, being a polygamous people and charged with many violations, was granted an unconditional amnesty when it wished to be annexed to the United States. The German Amnesty after WW II, one million Germans under the age of 27 were granted amnesty by General Clay, the High Command in that part of the world. Also in WW II, the Japanese Amnesty, one million Japanese were granted amnesty by General Douglas MacArthur, the high command in that part of the world. Then there is the Amnesty of the Confederacy. As a result of war hysteria the country was polarized into two definite factions—Union States, and States in Rebellion. Persons were charged with crimes ranging from murder and rape all the way up to and including, treason. Yet they were granted amnesty, both by decree of President Andrew Johnson of Knoxville, Tennessee, and also by act of Congress. If they could be granted amnesty, fighting against the United States, fighting to maintain slavery, fighting to preserve the Confederacy, then certainly, persons fighting for the rights of man, fighting for direction of change that is inevitable in our time, should and must be granted amnesty.

Amnesty does not mean crawling on your knees and asking forgiveness from the government. It means that the government is willing to wipe the slate clean, without any taint remaining against those granted amnesty. Angela Davis, Walter Collins, the Republic of New Africa, All Political Prisoners—they must be freed from jail and returned from exile, so they can help us build a society free of poverty, racism, and war.

LETTER FROM THOMAS J. CONNERS, WALTHAM, MASS. (MAR. 8, 1972)

DEAR SENATOR KENNEDY: I am a registered voter in Massachusetts and am addressing the body of this note to you as the chairman of the appropriate committee and as a senator from my state. I am also sending copies of the body of the letter to Senator Brooke, Congressman Drinan, the Herald Traveler, and the Globe. I also expect to read it into the minutes at the monthly meeting of the Paralyzed Veterans of America, New England Chapter on March 8, 1972.

I am writing this note to let you know my feelings on the *subject of amnesty* for those individuals who left the United States rather than serve in the armed forces or face possible conviction for refusing induction.

I am a combat veteran of the Viet Nam Conflict, having served in the fall of 1966 as a member of "C" Company, 2nd Battalion, 27th Infantry, 2nd Brigade, 25th Division. I feel that no amnesty should be granted to anyone who left this country for the purpose of avoiding service in the military. These individuals' motives may be many and varied but their actions were only self-serving. Their self chosen exile may have meant that someone else would be chosen to take their place in order to attain a set quota of men for a specified draft call. Their replacements were then subjected to the rigors of the military, and

possibly combat, injury, or death, as the substitutes for those resting securely in their newly chosen homeland.

If, as is now being expounded, these exiles in their wisdom knew the unjustness of the war and were really concerned with those who were being killed and mutilated in Southeast Asia, they did nothing but serve themselves by silently slipping out of the country. Their protest of the war by refusing induction, going to trial, and then to prison and appeals court and so on, would have been a worthy sacrifice for a worthy cause. If 100,000 (a figure sometimes quoted) is the number of exiles, imagine how 100,000 case of evasion would have brought notice to their cause especially if such notable attorneys as Mr. Clark, and Mr. Goldberg had lent their weight to this cause as they have to others.

No, it is my opinion that these individuals made a decision and the choice, whether it was well thought out or not, was their to make and therefore to live with. Just as the choice that was made by those who chose to serve was theirs to make and theirs to live or die by—as many have.

It would only be fair to grant amnesty if all the individuals who were offered the option to serve or flee, were given the chance to change their decision but this can not be done, unless congress can restore limbs, body functions, and life itself. It is unfair to require men to die for a decision they made in keeping good faith with their government's dictates, and their belief that laws are and must be obeyed if a society is to continue to function properly; and on the other hand grant amnesty to individuals who broke the law and whose major hardship may only have been difficulty in making a living or buying beer brewed in the United States.

Much of the social unrest that exists in the United States is a result of inequities in laws and in practices, in privileges and restrictions, in the fact that who or what you are determines how you shall be treated and what privileges or duties you shall be entitled to or required to perform. There is no need to create another similar situation where one group is exempted from the consequences of their decisions while another is buried for the required duty they accepted, only because they were standing in for some others who chose to break the law and flee—and one is too many.

So as I have stated I am against amnesty and as far as a national apology is concerned, there need be no comment. If an apology is in order it should be directed to those who have served and suffered, we can only pray for the dead.

Yours truly,

THOMAS J. CONNERS.

STATEMENT OF HAROLD M. DAVIS, FLAGSTAFF, ARIZ.

GENTLEMEN: I am a veteran, 25 years of age, and have been out of the service for three years. My total active duty with the Marine Corps was from Feb. 3, 1966 to Jan. 19, 1969. During my active tour of duty with the Marine Corps, I spent nineteen months in the Republic of Viet Nam (Jan. 67–Aug. 68). As a Combined Action Platoon Commander, I lived and worked closely with American and Vietnamese forces and the Vietnamese people. Rather than go into detail about my duties in Viet Nam, please feel free to check with Headquarters Marine Corps as to what the Combined Action Platoon's job was.

Since my return to the United States from Viet Nam, I have heard nothing but discenting opinions on the war in Asia. I have listened to good and bad arguments on both sides. I, for one, have always believed in our motives for becoming involved in this "police action".

Now, though, I discover that certain groups in our country are trying to persuade the American public and Congress to grant Congressional Amnesty to those who deserted the military or dodged the draft because they did not believe in the Viet Nam War. I do not deny them their opinions, as this is a right given by the First Amendment regarding the freedom of speech. The thoughts of individuals is also a right and immune to restraint as brought out first by Blackstone in *Commentaries* (1876) and confirmed by the Supreme Court in *Robertson vs. Baldwin*, 165 U.S. 275, 281 (1899). The mere fact that they have a right to their opinion does not warrant their being forgiven for failure to comply to the laws of the United States.

These people who ran from our land and our laws left of their own accord and in complete denial of the American system. Why then would the American public want to allow these ungrateful individuals back into a society that believes in our government? I believe that changes are needed in our society today, but I've never believed in running from a fair fight.

To grant amnesty to these malcontents would be saying to those of us who are *proud* of the fact that we *served our country*, that we need *not do anything* our government tells us to do again. If this amnesty is granted, the Government of the United States will no longer be a just and equal legislative power.

There are several organizations across this country who try to help the Federal Government by explaining to the public the reasons behind our legislative decision. How can they explain forgiveness for people who denied our government and our laws?

Will these "forgiven" men be accepted by the majority of the American public, or will Congress shelve to pass another equal rights law for deserters? If they are not accepted we will have more bums and revolutionaries than ever before in our country's history. Can we afford this? I think not.

Amnesty defined means—"a general pardon for offenses against a government". How many people whose sons, brothers, uncles, fathers, cousins, or nephews died, can also grant this pardon? I lost many friends, and I cannot find the forgiveness in my heart or soul. I beseech you to deny this amnesty in the name of the American people.

STATEMENT OF CHARLES L. HUBER, NATIONAL DIRECTOR OF LEGISLATION,
DISABLED AMERICAN VETERANS

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: The Disabled American Veterans wishes to express our appreciation for the opportunity to present our views on pending legislation which would offer amnesty to persons who have failed or refused to register for the Draft, or who have refused induction into the Armed Forces of the United States.

Before discussing the subject, we believe it would be helpful to give you a brief summary of the eligibility and history of the Disabled American Veterans. The DAV is a federal corporation whose charter was granted by the United States Congress by Public Law 72-186 on June 17, 1932. The organization was originally formed in 1920 by a group of disabled veterans of World War I. This was the predecessor of the present federal corporation. Membership in the Disabled American Veterans is composed only of those who have been wounded, disabled or injured while serving honorably in the Armed Forces of the United States in time of National emergency or war. The Disabled American Veterans is a patriotic, non-competitive, service-giving veterans' organization dedicated to the important objective of extending much needed service to, for, and by, America's disabled defenders.

Bills pending before your Committee would provide amnesty for draft resisters within this country and outside, on condition that they undertake three years of service in the Armed Forces, or elect to serve in alternate service, which would include Volunteers in Service to America (VISTA), Veterans Administration hospitals, Public Health Service hospitals, and other federal service provided by appropriate legislation.

The National Executive Committee of the Disabled American Veterans has recently approved a resolution opposing amnesty which would permit draft resisters and deserters to return to the United States with relief from penalty of law for their acts. Our opposition is based on the fact that there are over 28,500,000 living veterans who have honorably served their country; over 5,000,000 servicemen and veterans have honorably served during the Vietnam era. Of this number over 55,000 have been killed, and several hundred thousand others have been maimed or disabled as a result of their active military service in Vietnam.

We can not agree with the concept of granting amnesty by permitting these draft evaders and dodgers to perform "equivalent service" in public service. It is our contention that this so-called "equivalent service"—a safe public service job that is free and secure from harm—certainly is not equal to the risking,

or giving of one's life on the battlefield. The Disabled American Veterans would be opposed to this type of person being given a job in a Veterans Administration hospital to care for those who served honorably and well. No special consideration for government employment should be considered for these resisters upon their return to the United States.

We feel that there is a legitimate means for registering dissent, and that the citizen cannot take illegitimate means to decide for himself which laws he will obey and which laws he will disobey. How could the United States ever field an army with draftees again if it is determined that draft evasion will be forgiven? And what effect would amnesty have on the morale of these currently serving in our Armed Forces? Are our Armed Forces members to be subject to additional ridicule by the very same people who have done so much harm to our country by leaving it and thereby giving aid and assistance to our enemies?

Intellectual, political or sociological convictions against the war can not be accepted as excuses for amnesty to those who set themselves up as wiser and more competent than society to determine their duty to the nation. The draft evader knowingly chose to put his conscience above the constitutional processes of our country. We believe that in a democratic society violations of the law should not be overlooked.

It is our considered opinion that amnesty should not now be granted, but instead the merits of each individual case should be decided separately, and only after the end of the conflict when all of those who saw fit to serve under the banner of the nation are home.

Again, Mr. Chairman, thank you for giving us the opportunity to present our views.

Attached is a copy of a resolution approved by our National Executive Committee on March 2, 1972.

RESOLUTION

Whereas, there is legislation pending before the Congress of the United States to grant amnesty to draft dodgers and deserters from the armed forces of the United States who have sought sanctuary in foreign lands; and

Whereas, these men, upon return to the United States, would be granted full amnesty and relief from penalty of law for their acts; and

Whereas, the Disabled American Veterans, a congressionally chartered organization composed of men and women who have completed honorable service in the armed forces of the United States during time of war or national emergency and who have given much of their physical well-being in the defense of our country, protests a concept that would provide amnesty for such despicable, unpatriotic conduct; and

Whereas, the Congress of the United States should consider the effect of this bill upon the morale of those serving on active military duty, paraplegics, amputees and all of the other thousands of severely disabled veterans who acquired their disability in combat with the enemies of this nation and have always heretofore taken pride in that service and in their honorable discharge; Now therefore, be it

Resolved That the National Executive Committee of the Disabled American Veterans opposes the pending legislation granting amnesty, and urges all members of the United States Congress to reject this legislation as being unworthy and unpatriotic and contrary to the traditional values of honorable military service in time of emergency or war.

STATEMENT OF JENNIFER JACOBS, ROBERT MACEK, AND PAUL POST, DRAFT COUNSELING CENTER OF BUFFALO, N.Y.

As one of the groups most active in the repatriation of American draft exiles, we are concerned with the condition of men who have no need of *amnesty* by statute or executive order because the induction orders, under which they felt forced to exile themselves, were issued illegally or have since been made invalid due to later court decisions. From our experience, we estimate that a large minority of these men have an unequivocal legal right to have their induction orders cancelled. Most of these men are unaware of this right.

In many such cases, we feel, these men's orders have not been cancelled only because they are known to be in Canada. Probably in most cases, however, these orders remain outstanding due to totally inadequate review of the man's file prior to its being forwarded to the U.S. attorney's office for prosecution. Currently, such review is in most cases, accomplished by an official in the State director's office working with what is called the "General Counsel's Checklist." That this checklist is unofficial and unpublished, and the actions taken pursuant to review under its questionable standards are merely conclusory in nature—to proceed with or to decline prosecution—without comment included in the registrant's file, would seem to be a serious deprivation of due process of law. Lack of publication prevents informed comment by those knowledgeable about selective service law, prevents revision to reflect recent changes in the law, and, most seriously, forecloses to the registrant the possibility of ascertaining the standards used by those officials who decide whether or not to indict. After this initial review, the file is forwarded to the U.S. Attorney's office where it is usually only with the help of defense counsel that a man's invalid order is officially cancelled. Most young men in Canada are unaware even of the possibility of such cancellation at either of these two levels or with an attorney's aid short of trial. So they never contact an attorney, mistakenly believing only a trial is possible: the result is that many men are under prosecution who should not be, due to a combination of their fear to return to face trial and the failure of government agencies to drop charges unless facing an attorney representing the man. We feel the government should do more for these men.

To release such men from their unfounded exile, we strongly urge the drafting of legislation which would require a full review and careful scrutiny of the files of men currently facing prosecution—some 25,000 cases in number—and that this review also be extended to all future cases and those files of hundreds of men that have yet to receive any review to date. Such a review we feel should be conducted according to publicly revealed standards published in advance and that these standards and review be accomplished in the light of court decisions which have been handed down since the time of the issuance of the original order to report for induction by the local board. And we suggest these measures be taken with the serious purpose of cancelling unenforceable induction orders issued as a result of erroneous processing by the selective service system. We ask that the government be compelled by Congress to be much more diligent in giving up obviously untendable prosecutions and thus end these unnecessary exiles of American citizens.

That a significant percentage of all induction orders are invalidly issued is confirmed by the statistics for selective service prosecutions in the Federal courts. For instance, in fiscal 1971, only 35-0/0 of selective service indictments terminated by court decision have resulted in convictions. And these indictments which reach court represent a small percentage of the total number of alleged selective service violations referred by selective service state headquarters to the U.S. Attorney's offices. And, as noted earlier, the "Unofficial Checklist" eliminates yet more cases from reaching the U.S. attorney. The conclusion that is obvious is that huge numbers of illegal induction orders are issued by slipshod local board processing. But it is from the original issuance of an induction order that men are moved to leave for Canada. More careful processing and more energetic efforts by government are required in redressing these wrongs of due process and notifying men of the needlessness of their exile. Amnesty, in these cases, is neither required nor appropriate, as these men are not "fugitives from Justice," but fugitives from injustice—victims of Governmental error and governmental indifference to the exiles that their errors have caused. While we have helped many men to repatriate, the sheer volume of such cases requires a legislated response. Private groups such as ours, with extremely small financial and human resources, can never effectively meet the massive need for corrective measures which properly fall upon the respective governmental agencies which have caused these injustices. We feel that such legislation is a compelling social necessity.

We would further urge that legislation require fuller notification of the cancellation of an invalid order than the simple mailing of a new 1-A Card, 15 days after which a new, probably valid order could be issued in most cases. We would suggest a minimum requirement of 60 days advance notice prior to

new reclassification, after a determination is made that the original order is invalid. This time will insure to a much greater degree that a man in Canada will receive this "good News" in time to advantage himself of it. As the government's mishandling caused his original flight to Canada, its admitted error mandates the extension of this additional time off the man to receive notice and reestablish contact with his local board. His are unusual circumstances requiring an unusual courtesy.

We would also urge that you insert these remarks in the official record of your hearings. We will be submitting a fuller statement of these views by letter within a few days, and would ask that its proposals, accompanied by fuller argument also be inserted in the record and receive your consideration, perhaps in renewed hearings dealing more specifically with such legally justified repatriation.

STATEMENT OF KENNETH FRED EMERICK, CLARION STATE COLLEGE, PA.

In recent months we have heard "amnesty" for war resisters discussed time and again.¹ Despite the obvious fact that the majority of these resisters are now in foreign lands, we have made almost no attempt to discover who these men are. We know very little about their families or their backgrounds. What is more, we discuss amnesty while we overlook the views and attitudes of those most directly concerned—the resisters themselves.

What is worst of all, we generally have badly distorted notions of why these men have become refugees and exiles. We have assumed that either the draft or the Indo-Chinese war were the causes—and the only causes—when indeed they were not.

Until we know who these men are, recognize their backgrounds, comprehend their views and thoughts, discover why they chose to leave, and determine what their wishes are, we can only proceed in ignorance toward some new and unforeseen error. Hopefully my testimony might redirect that course.

The basis for my conclusions comes from two years of research and writing on the 60,000-100,000 resisters in Canada. These conclusions, and the justification for them, will be published in book form in late April as *War Resisters Canada; The World of the American Military-Political Refugees* (Knox, Pennsylvania Free Press, Knox, Pa.).

As preparation I talked to hundreds of resisters, along with their wives, associates, friends, ministers, etc. I also talked to dozens of people who have operated the "freedom train" in Canada. Thirty-three of these resisters completed a long questionnaire which was followed by a personal interview of several hours. In addition, I studied most of the material which has been published on the subject over the years.

For obvious reasons there is little one can do here, except to briefly note some of my conclusions as they relate to amnesty.

However, it seems appropriate to indicate why we lack so much knowledge about the resister. The chief reason, it seems to me, is that we are kings who choose not to hear the bad news. Or as Monsignor Charles Owen Rice of Pittsburgh says in his foreword to *War Resisters Canada*, "We will these men, who are so close to us and are of us, to be all but invisible because their existence in such considerable numbers is a reproach and an embarrassment to us and to our institutions." Otherwise, we would find the experiences, the hopes, aspirations, fears, and accomplishments of these men fascinating. They closely parallel the experiences of our forebears who first settled North America itself.

My personal experiences only confirm that view. At least twenty periodicals have totally ignored my offer to write an in-depth article on why these men actually decided to live elsewhere.

What is even worse is that the American people have been literally brainwashed regarding the resisters in other lands. Even the most sophisticated people have been led to view the resister as a bum, misfit, drug freak, revolutionary, coward, or misguided fool—part of a small group numbering in the

¹ However, this talk has never involved actual amnesty, but watered-down versions that require the resister to legitimize the very system he has rejected, to accept a penalty he has already refused, or requires him to ask "forgiveness" for a "sin" that he feels was committed by his country.

hundreds or a few thousand at most—waiting in near desperation to come home. Although there are morsels of truth in such attitudes, the reality is quite different. In fact, if these notions were entirely reversed, truth would be more accurately served.

To consider amnesty in any meaningful way, we must know why the resister is in the North Country Fair, Sweden, or England. It took me only a week among the Canadian exiles to realize that the overwhelming majority regard the draft and the war as only partial causes for resistance, and often those factors are acknowledged to be mere symptoms of an American malaise. While a majority of Americans now regard Vietnam as a "mistake," most resisters think of it as more than that—as a manifestation of "what America is all about," as they would put it.

A great many of these men are not leaving the Army or refusing induction so much, as they are rejecting the values of our society and the direction it is taking. And I have to agree with the resister who told me that "I think many Americans sense this."

Almost without exception, the resister suffered despair and disillusionment with the nation and American life. Let me quote a few brief statements from typical resisters:

Dennis, in referring to his hospital conversations with returned wounded veterans from Vietnam, told me, "They talked about atrocities, shooting people, and throwing people out of helicopters and stuff like that. Things that you know went on, but when people sat and talked about it as though it were baseball, it's a little too much. It opens your eyes more and more. At my first opportunity I was going to get out. There was no way I could walk down the street wearing that uniform. I was definitely dissatisfied with the United States, and I would eventually have gone somewhere."

Joe, a mature man with two children, who had unsuccessfully sought a hardship discharge, related, ". . . there were other dissatisfactions. We were just getting sicker and sicker of every possible aspect—pollution—racial discrimination—the expenditures in the name of science for God's sake—sending men to the moon while people are dying of starvation here in our own country. This kind of thing makes me sick to think about."

Don, a quiet and reflective library worker who really felt sad at having to leave the country, remarked: "When I was in high school, John Kennedy was President, and I was really a solid liberal Democrat. The think that shook me out of it was the assassination of Robert Kennedy. After he was shot, I decided there wasn't any use in trying to work within a country that was so morally corrupt. It wasn't just that he was killed, but that even his death didn't do any good. It was just like a poker game—he died and they divided him up—Humphrey took most of him and McCarthy took a little. I was deeply dissatisfied with the war, the Black situation, and the moral corruption in government."

Guy, a Chicagoan who traveled alone in Europe and Africa in 1968, told me how he felt when he was drafted. "I was completely disenchanted with the United States and the American dream. I saw through the whole thing—it wasn't what it was made out to be—Black people were really being put down—justice is kind of ridiculous when you hear what happens in the courts—and capital punishment. . . . In 1968 I spent three days at the Convention in Chicago and got beat up a few times and thrown in the lagoon once. That really cut the cake after I got back from Europe."

Tobey, a young man who went into the service and tried to accept and live within the system, commented, "America is like that—you can live forever in the United States in this sickness and not really have it hurt you, influence you, or step on you, but it does to Black people, to some people who are drafted, to minority groups. I couldn't do it, and didn't believe in it, and I decided to come to Canada and become a Canadian citizen. There are an awful lot of people coming up here who are sick of it."

This despair, coupled with individual moral principle, once confronted with an outright demand that he become an instrument of policies that were repugnant to him, triggered the resister's decision. A significant percentage, possibly as high as twenty percent, of these men would have left the United States eventually, even without an involvement with the military.

The resister had largely concluded that American democracy no longer functioned; he found little freedom for his own views or moral choices; he saw minorities exploited and repressed; he observed no tolerance or understanding as he was taught to expect; and he noted that technology and the dollar were god, rather than the human values he craved. His choice, like that of the European immigrants who settled North America, was to leave and seek a better and a more hopeful land.

In the light of the last few paragraphs it seems apparent that a large portion of the resisters in Canada will not be as anxious for amnesty as we would like to believe. Many resisters would ask, "Should we grant amnesty to the United States," or as Bob Lanning put it:

"The question is who is giving amnesty and who should get it. Should it be the young Americans who have dropped out of that obscene society and gone to another place, or should we resisters take a vote and decide whether to grant America an amnesty for being so cruel and obscene and being the massive destructive force that it is? If amnesty is granted, there won't be as many people flocking back across the border as Americans anticipate. A lot of them will be established here and not want to uproot themselves again, but to me it's not worth waiting for them to grant amnesty. It's going to be them waiting there for us to grant them amnesty."

Typical of the responses to my questions about a desire for amnesty were these:

"Yes, to travel, or if an emergency came up for my family. I would like to be able to go and see them and not get busted."

"I wouldn't want it—not even to visit. What am I going to do—visit the Lincoln Memorial or the Washington monument?"

"Basically it's not a consideration of mine to think about amnesty, although it would be a very welcome thing because I could go back and see my family."

"The only reason I desire to go back is to see my family, and that's on pretty shaky ground too as far as I'm concerned. I'm indifferent to it."

Only one resister of 33 really desired amnesty in order to return permanently to the United States, but he had only been in Canada two and a half months. Even then, he acknowledged that "a murderer will have a better chance than a deserter or dodger for a job in the United States." However, twenty resisters desired amnesty, but only to travel and visit. Six resisters said amnesty made no difference to them. DJ said, "The only reason some people regret coming is that they can't visit their folks."

My own conclusion does not support the hopes of some and the vast numbers of Americans who would like to believe that the resister in Canada is waiting impatiently to return to their society—a society which resisters have little hope for, and one they have rejected in the recent past. These hopes are naive, although in some cases they may be innocently based on the false assumption that the war and the draft alone drove Americans across the Great Lakes.

The vast majority of resisters, from their deepest feelings, seemed to be saying, "We prefer and respect a land which provided an alternative when it was desperately needed—a nation of people who gave some understanding, some acceptance, when our own showed contempt. We could never renounce that part of our soul that brought us here, nor ever feel at home among those who besmirched that soul and persecuted us. There is no way to erase that."

We have all heard the notion proposed that maybe draft resisters might be permitted to return, but not deserters. Such proposals, it seems to me, are again the result of a lack of information.

There are no vast or significant differences between these two groups, except that deserters were somewhat less critical, and arrived at their decision somewhat later than others—a late-blooming awareness quite common to many members of the House and Senate—indeed to the body politic as a whole.

Many deserters were strongly opposed to participation before induction, but they leaned over backwards in an attempt to comply with the nation's will, even though they often knew in their hearts that ultimately they would reach a point beyond which they could not go.

Furthermore, it is estimated that 10-15 percent of the deserters in Canada are survivors or graduates of the war in Indo-China. The percentage in Sweden is higher.

Of the 21 deserters who endured my study, five had served their full course in Vietnam and had been returned to the United States. One had only 137

days of easy state-side duty to serve, only 125 miles from his home and his wife, where he spent every weekend.

One had received a Bronze Star. Two others had been wounded, one very seriously. One was the son of a career military officer who had served in three wars, including Vietnam; his life's ambition had been to be a soldier.

These were essentially very conservative men who finally changed their views about the United States once they witnessed Vietnam. Even though each was relatively near discharge, they were unable to continue their own lives in what they had once believed was "the greatest country on earth."

It seems inconceivable to me, and to most of the men in Canada, that a distinction, in terms of amnesty, could be made between these two groups.

I have also heard opponetts charge that amnesty would insult those who died or served in Vietnam. But the fact is that many survivors of Vietnam now feel that they too should have said NO. Surely it is not reasonable to argue that the very victims of Vietnam—the men who served or died there—should be USED to victimize still others. Hopefully, our society is less sick than that.

At this point, I shall try to speak for the resister and indicate his desires and note how he is likely to react.

First, most resisters, but not all, would like the freedom to travel and visit in the States. There is no reason why this cannot be arranged soon and without great difficulty. They are in effect on the way to becoming Canadians, and there is no logical reason not to treat them as such. I would hope, however, that visitation privileges will not be used as a cop-out, or a substitute for amnesty.

A small percentage of resisters have returned to visit, but obviously the danger of apprehension has limited these visits, particularly in relation to the family. As time passes this trickel will become a flood, and an unmanageable one because:

- (1) few Americans will have the heart for enforcement
- (2) too many families and friends will be antagonized by strict enforcement
- (3) bureaucracy will be unable to cope with the vast numbers
- (4) travel between the two countries would be too badly hindered
- (5) relations between Canada and the United States might become intolerable if new Canadians were seized in any number

Secondly, the resister desired a better America. He still does, and in fact many hope that their decision will contribute to that cause. In terms of resister thought, as I read it, this would include:

- an understanding and acceptance of youth
- a change in emphasis from law and order, to law, justice, and dialogue
- a recognition that individual rights must come before the needs of the state
- an emphasis on diplomacy and cooperation rather than on military power and world policemenhip
- a rejection of the military's domination of American society and policy-making
- a drastic lessening of the economic domination of other lands
- recognition that American intervention in Vietnam was evil

Few resister desire an amnesty, or will utilize one, except to travel or visit, unless, of course, the nation does indeed change its course in the ways I have just noted. He has little desire to return to a way of life that he has already rejected with a deep personal commitment. He has no desire to be uprooted again, or to return to jeers, discrimination, and employment difficulties. After all, most resisters regard Canadians as friendlier and more open; they see Canada as more hopeful than the society they left.

To devise some pseudo-amnesty may fool some of those here at home. But except for the resister who returns because of extreme family difficulty or tragedy, no resister is coming home to go to jail, which he vetoed long ago. He did not make a personal commitment, which he views as an affirmative act, to return home either as an indentured servant or to legitimize the evils he saw by taking some oath.

My own hopes, dim as they often are, call upon me to suggest that we offer

visitation privileges at once, not only to those in other lands, but to the imprisoned as well.

Let us also undertake a new course and re-orient our priorities by turning away from militarism, foreign adventure, repression, discrimination, and materialism. Surely only a fool would regard all those voices out there in our own land, or in Canada, as mere cries in the wilderness.

And lastly, let us summon up the maturity, the understanding, and the wisdom to grant a real amnesty, without strings, to all those—in jail, overseas, or underground—who had the wisdom and the moral courage to arrive at conclusions long before many of us dared. National reconciliation and healing demand no less.

A well known Lutheran minister, Richard John Neuhaus, has said:

"Hundreds of thousands of immigrants came to America in the 18th and 19th centuries to escape military conscription in Europe. Americans welcomed tyranny's rejects and erected a Statue of Liberty as a beacon for dissidents throughout the world. If the streams of magnanimity have now dried up in our national life, if we vindictively refuse to grant pardon and amnesty in search of national healing, then perhaps it is time to take Senator Eugene McCarthy's suggestion and turn the Statue of Liberty around—recognizing that an era has closed in this once hopeful land."²

I hope that I have been able to reflect the resister in Canada accurately, but I can only suggest that members of this Committee talk at length with many of these men where they are now. They can speak far better for themselves than anyone else.

Thank you.

STATEMENT OF MRS. DORIS GORDON, SILVER SPRING, Md.

I have followed wherever I could the debate on amnesty in the newspapers and the radio and would like to submit the following statement which I hope you will add to the record of the Judiciary Sub-committee's study of the question.

I am a middle aged, middle class housewife and I feel I can claim a certain amount of objectivity and unbiased point of view because I have no dear friends or relatives but only casual acquaintances serving in the armed forces and none evading service. However, I believe I can understand and empathize with those on both sides of the debate who have been made to suffer in any manner by the unconstitutional draft and our involvement in an immoral war.

To those who are afraid that our system of laws will be undermined because some were courageous enough to act according to morality in defiance of an evil law, I say—Our country is like a body which, when it gets sick, needs to rid itself of the disease and poisons that afflict it in order to get well. Bad laws are a scourge on society and will only serve to kill our country. We should be thankful for those who, having diagnosed the illness correctly are courageous enough to administer the necessary medicine and provide the right treatments even though the patient foolishly objects due to the painful treatment he will have to undergo. Let's eliminate the virus, rid this country of the draft law once and for all, set up safeguards against future unthinking involvements in immoral war and ill-advised alliances that drain this country of its people, goods and sanity, or we are sure to have a relapse. Bad laws, just create a disrespect for all laws. Let's keep only wise and just laws so we can love and obey them.

To those who say that it is unfair to the ones who served and suffered and died if we let the others go unmolested, I say—Why do you want to impose an unearned retribution on them? They did not cause the harm to you or your loved ones. How will it help you if you join your torturers by torturing them? Does 'equal justice under law' mean mistreating everyone the same?

To those who are worried that our armies will be demoralized if amnesty is granted, I say—The whole country has been demoralized already. Taking positive steps to remedy the evils and correct what wrongs can be righted, can only serve to act as a soothing medicine that can help to make our country healthy again.

² Richard John Neuhaus, "The Good Sense of Amnesty," *The Nation*, Feb. 9, 1970, p. 148.

To those who are afraid of what will happen to the machinery of the draft I say—It should be eliminated as it is an irritating sore on the body of our laws and because it is both immoral and unconstitutional. Let's affirm our faith in the dream of our forefathers that created a freedom unknown to man anywhere. We can have a good volunteer army. We cannot defend freedom by depriving people of freedom.

To those who want to grant conditional amnesty based upon further involuntary servitude, I say—Read Amendment XIII to the Constitution and your oath that you took (if you are a government servant) in which you promised to uphold it. What about your pledge of allegiance to liberty and justice for all? Haven't you hurt these boys enough?*

To those who want to wait until the war is over and the unfortunate prisoners of war are returned, I say—Why prolong suffering that can be alleviated, why put off doing what you know is the right thing?

To those who say that some fled because they committed a real crime like stealing, I say—That is a separate matter and should be treated separately.

To those who merely ask for an apology because of the wrongs done to them, I say—You should be demanding justice and you should point your finger at those who victimized you and demand that they, the real criminals be brought to trial and receive justice.

To you who raise still further objections to amnesty I say—There can not be any valid objection except one. How can you grant amnesty, that is, forgive someone who has not done wrong but done right?

The issue is clear and simple. The only reason so many are having difficulty deciding what is right and what is wrong is that the defendants are innocent and the accusers are guilty.

LETTER FROM CELIA E. KAPLAN, NEW YORK, N.Y.

I hope this letter can be useful in the hearings. It may have already been read into the Congressional Records.

Sincerely,

CELIA KAPLAN.

DEAR MOM AND DAD: This war that has taken my life, and many thousands of others before me is immoral, unlawful, and an atrocity unlike any misfit of good sense and judgment known to man. . .

So, as I lie dead, please grant my last request. Help me to inform the American people—the silent majority who have not yet voiced their opinions.

Help me let them know that their silence is permitting this atrocity to go on and that my death will not be in vain if by prompting them to act I can in some way help to bring an end to the war that brought an end to my life. . .

Keith
KEITH FRANKLIN.

This letter was written to Mr. and Mrs. Charles Franklin of Salamanca, N.Y., to be opened in case of death.

LETTER FROM JULIUS KLEIN, CHICAGO, ILL. (FEB. 10, 1972)

DEAR SENATOR KENNEDY: It is my understanding that you will conduct hearings in the near future with regard to the possibility of establishing a policy to grant amnesty to draft evaders. Permit me to give you my personal views on the subject. I might add that these are my own opinions, and not those of Jewish War Veterans organization, which has not as yet taken an official stand on this issue.

My position on the matter is very clear, as I am surely opposed to granting amnesty to deserters and draft dodgers. However, I do not object to conscientious objectors. We must not forget that approximately 2 million American

*I have just spoken to Sen. Taft's office and was advised that he doesn't consider the condition of alternative service to be involuntary servitude because the boys can choose not to return. I say then that conditional amnesty is self-contradictory because it still is a punishment. Why grant any amnesty if they have done a wrong? If they have done no wrong, why must they be forced to spend more of their lives according to the wishes of others in order to be allowed to return home?

young men have served in the very unpopular Vietnam war, and nearly 50,000 of our comrades have made the supreme sacrifice in Vietnam. Therefore, whether we, as citizens, are pro or anti-Vietnam we must follow the law of the land.

I am aware of the fact that at the moment there are several Bills pending in Congress. Possibly Senator Taft's Bill will be appropriate some day, but at this time I am not convinced that he is correct either in his views. Being anti-war and anti-Vietnam should have no bearing on a man's duty toward his own country inasmuch as he is a citizen enjoying the freedom and security of our nation. There were also men who were deserters and draft dodgers during World War II and the Korean War, and they accepted the consequences for their action. However, for the first time we are confronted with many men who have chosen to flee our country in order to avoid their service to our nation.

It is my opinion that before a decision is made regarding this issue, that we should obtain the views of the widows, parents and families of those GI's who sacrificed their lives, were wounded or served in Vietnam. Perhaps they could be polled through an organization. They should have a strong voice on the matter, as this much we owe to them.

My dear Senator, I would like you to know that I am certain that our organization, The Jewish War Veterans of the United States of America, would like to be heard on the subject. At the moment, our National Commander, Mr. Jerome C. Cohen, is on a fact-finding mission with NATO and the Sixth Fleet. He is scheduled to return to the United States around February 20. Our Executive Director of our national headquarters in Washington, D.C. is Mr. Felix Puterman. In the event that it is not possible for our National Commander or myself to take part in the hearings, I shall appreciate if this letter is entered into your records. However, we naturally prefer to express our views personally at the hearings.

I might add that our organization will hold its policy and National Executive Committee meetings in April. Our National Convention is scheduled to take place in Houston, Texas in August, 1972 at which time we will take such action regarding this issue that will have the approval of all delegates and members of our organization, which is the oldest veterans organization in the United States.

With warm regards and best wishes, I beg to remain

Most sincerely yours,

JULIUS KLEIN,

*Chairman, Military Affairs Committee,
Jewish War Veterans of the U.S.A.*

LETTER FROM JOHN M. MACARTHUR, CLARKSBURG, MD. (APRIL 5, 1972)

DEAR SIR: In October of 1965 I enlisted in the United States Marine Corps. At that time I could not avoid serving, by claiming to be a C. O., without being a member of a church that would not allow violence for any reason. I was not a member of such a church so rather than become a draft dodger I went to the enlistment office in my area. The only recruiter that was in at the time was the Marine Corp's, so I figured that it was no worse than the rest, and I signed up.

After signing up I was sent to Paris Island for training and brain washing. At Paris Island, I became aware of the fact that I was being molded into a small cog in the wheel of the large bureaucratic war machine. I did not quite measure up to their standards but after what I consider an inadequate training period, I was graduated a full fledged, (by their standards) Marine. I had not even taken or passed the combat important physical readiness test.

During my stay at Paris Island I was told by my drill instructors that the President had stopped all Marine activity in Viet Nam. I wrote President Johnson and asked why he had done so, listing the failures of the Army in all other combat areas that had been drummed in my head through endless hours of Marine Corps history. All I received for that venture was extra physical training exercises and constant harassment from my drill instructor.

I was then sent to various schools throughout the country to learn how to check trucks and jeeps for broken mirrors and other first echelon mainte-

nance duties. My first active duty station was Camp Le Juene, where my views in this country's involvement in South East Asia kept me under constant harassment. There was a Sargent in charge of my platoon that told me, since I had a young wife and child, I should do extra favors for him, to be kept off the West Pac quota list. I refused to bow down to his sub par intelligence and within two weeks I had order to go to Viet Nam. I was not sure where I was going to end up or what I was going to do when I there. I told the lieutenant at the company office I really didn't think I could Kill anyone and I was told if I didn't want to come back in a plastic bag, I would learn how real fast.

I went home on leave and I refused to return. At the time there was an air plane strike and I used that as an excuse for not reporting to Camp Pendleton. One evening two Armed Forces policemen came to my house and took me to Marine Corp's headquarters, where I was held pending shipment to California.

When I arrived in California, I was sent to Staging Bn., H & S Co. awaiting office hours for unauthorized absence. Some of my "fellow" Marines told me the only way to avoid being sent to Viet Nam was to apply for a hardship discharge. I went to the company office where I was laughed at by the first Sargent, one first Sgt. Forst, and told he would have me in Viet Nam before I could file the first papers. I had office hours and was sentenced to correctional custody platoon for 30 days. While incarcerated there I was beaten by one of the guards and told my bags were packed for overseas. I cracked and was sent to the hospital where I was given some nerve pills and sent back to correctional custody.

When I was released from correctional custody I was sent back to H & S company awaiting oeswea. I wrote many, many letters to congressmen and senators asking for help. Senator Joseph Tydings wrote the base Psychiatrist and he recommended I be given an administrative discharge. I took this recommendation back to first Sargeant Forest, who read it and rolled it up into a little ball and threw it in the trash. He then told me that I was a coward and the "gooks" would save him the trouble of killing me. I went back to the barracks and packed my bags and left again. I would not be forced into fighting a war I felt was wrong.

I stayed A W O L for almost two months then I got tired of running and turned myself in. I was taken from Los Angeles to Long Beach. At Long Beach I was placed in the custody of the Marines, all of whom were or said they were Viet Nam veterans. There were three or four other Marine prisoners there.

One night one of them slit his wrist, (I can still hear his blood dripping on the floor). When the guard came in to check on us, he discovered this and yanked the injured Marine out of bed and called for the other guards. The head guard a Sgt. Sheaperd hand cuffed the hurt Marine to his bed and started kicking him asking him where is the razor blade. Finally and mercifully the boy passed out from loss of blood and the physical beating.

Then the rest of us were hearded out into the hall and placed spread eagle against the wall-each one of us with a cocked 45 caliber pistol at the back of our head. We were told if we so much as breathed hard our head would be blown off. Then Sgt. Sheaperd called me back into the room to wipe up the blood and help look for the blade. I was on the floor when all of the sudden there were four or five guards all around me and Sgt. Sheaperd said something to the effect he thought they should teach the cowards a lesson. They all started punching and hitting me while I tried to run for the door. I remember the Sgt. Telling them not to hit me in the face because that would show. They literally beat the shirt off my back before I got out to the corridor.

That night, and several since, I laid awake waiting for those guards to appear and beat me again. The next day I reported the beating verbally to the Captain who said he doubted if there was any truth to my story, and that he wasn't going to check into it.

I was then sent to Camp Pendleton Staging Battalion H & S Co. and again I was brought before the same 1st Sgt. Forest. He told me I would never get a hardship discharge and that some night he would have me taken from the brig and sent to Viet Nam in chains.

I was put in Camp Pendleton's base brig for safekeeping while awaiting trial. Since then, the tip of the iceberg of truth about that brig has been re-

vealed. The entire time I was there I was beaten by guards or fellow inmates (who did it as a favor for the guards to earn extra cigarettes). I was, for long periods of time, kept in the ice box or the hot house.

The ice box was a frame enclosures with chicken wire sides that had canvas flaps and a metal roof with one small oil stove up front by the guards desk. In the center were six cells or cages. During the day the flaps were kept down so the heat would be unbearable and at night the flaps were up so you would be intolerably cold. The amount of clothes you could wear, was at the guards discretions.

The hot house was a large metal building with sixteen 4 x 8 cells. There were steam pipes under the floor and the floor sometimes was to hot to touch. All showers and toilet facilities were out side and you had to actually beg for permission to use them.

I was told by other inmates that the corpsmen would give you drugs for cigarettes or local girls addresses and the like. Later, I was called in by the office of Naval Intelligence and I admitted I had used marijuanna and that I had frequented Dupont Circle when I was at home. I also told them that I thought Viet Nam was a very wrong war and would not go. The man questioning me said "Don't tell me, tell the President."

I then wrote President Johnson a long crazy letter denouncing the military and threatening crazy actions if I could not be released. The reply I received was if I didn't want to serve my country I was no better than a second class citizen.

I went to see the chaplin but he was no help. He said he had no power to help me. I went back to the psychiatrist and once again he recommended I receive a discharge but as far as I know his recommendation was turned down.

I went to a court martial and told the court my entire story and was sent back to the brig. Naval Intelligence again came around and he told me that I was a known drug user and a latent homosexual. He said i could get out of the Marines by making some statements to him and sign them. So, I made up a long story about drugs I had taken and homosexuals I knew and signed it. He then laughed and said I could go to jail for those statements for a long time.

After I was released from the brig I returned to H & S company and I was written up everytime I turned around. Finally they got me back in the Brig.

On my previous incarceration I had told the brig C. O. about me being beaten. When I went back the same guards were there, but as a result of my statements several had been demoted and they were visibly glad to have a chance for revenge. Once again I was beaten and called a coward a communist and other degrading names. I was stripped of my will to live.

Then one day I was called to company headquarters. I went into an office where some Lieutenant read me my rights and told me, that due to my statements to Naval Intelligence, they were going to court martial me and send me to Portsmouth Brig for about twenty years. I told him that I had lied to Naval Intelligence and he said that making false statements to a government agent was a more serious offence. He then told me that after I got out of Portsmouth I would be given a dishonorable discharge and would have no rights in this country. He told me the only way to avoid this was signing a statement that I was not fit for the Marine Corps and would agree to leave for the betterment of the service. I asked whsat kind of discharge would I get, and he said not dishonorable. I was scared, so I signed, and a short time later I received an undesirabel discharge. A discharge that carries a question mark in everyone's mind.

I have had to lie about my discharge on evey job application I have filed and live with the fear that some day someone would find out and I would lose my job. I have had to carry the burden of supporting a family, without being sure I would have a job from one day to the next.

Now I ask you was I completely wrong in wanting to serve but not wanting to fight a war? Do those that did follow that lead, deserve more of a break than I? Is it possible that the thousands of people like me told our side and caused them to leave? Should I have denied everything and gone to Viet Nam to die for refusing to fight? Why should I suffer out my life because I knew my country was wrong long before our National leaders admitted it?

I request that I, and those men like me, that were willing to serve this country, in this country, but balked at shipment to a foreign war, that our

convictions didn't believe in, be granted equal amnesty for our acts and given a right to a change of discharge from bad conduct or undesirable to a general under honorable conditions. I request the the committee if possible please withhold my name.

Thank You.

JOHN MAC ARTHUR.

LETTER FROM RICHARD A. MAGNEY, SPOKANE, WASH. (FEB. 21, 1972)

DEAR SENATOR KENNEDY: I am writing you in regard to the forthcoming Senate Committee Hearings *regarding amnesty* to military and selective service violators. I feel that it is important that certain considerations be made in reference to this subject.

The idea of amnesty is undoubtedly tendered by the uncertainty of our nation's wisdom concerning South Viet Nam. The war is now winding down and draft calls have been sharply reduced. Now the nation sees fit to pardon her young, who failed to assist in the greatest mistake of the Twentieth Century. Unfortunately, the problem is of greater measure than that. It is reasonable to assume that the only crime that the evaders and deserters committed, was that they were men willing to stand alone for what they believed to be right and decent. Many evaders chose to face prison terms and face unjust inflictions head-on. Other evaders chose to leave the country or go underground to escape the ridiculous waste of humanity by sitting in jail. However, it is of greater importance not to consider what they did but rather, why they did it.

In all cases of evasion or desertion that I have observed, there is a universal philosophy of attitude and belief. I would now like to explain briefly the substance of that thought.

The world and especially this nation is in a time in history of "sophistication". We are sophisticated technologically and yet we cannot find ways to live with our fellow man and resolve our differences. While we fail at domestic and worldwide social progress, we exceed in our ability to kill one another off. While millions of people around the world starve and need for food and medicine, we squander in the extravagance of bombs and bullets, that cause greater hunger and pain. While we talk of pollution and concern for the environment, we savagely rape and misuse the earth with our bigger and better war machines. We warn our young about the health hazards of drugs, cigarettes, and alcohol and then pretend it is a chore to send them off to war. Certainly there will always be disagreements among men. But hostilities will not resolve those differences. Wars do not prove who is right, but who is mightier in men and material. For nations to fight for peace, is as logical as people fornicating for chastity. We are all apart of the Brotherhood of man and the problems of one nation should be the problems of all all nations. We will never be able to solve the problems of the world, if we keep creating more by the vindication of war. It is time we forget the absurdities we die for and search for the realities to live for.

Many evaders and deserters have chosen to live their daily lives by being right and decent men. It seems incomprehensible that they should be pardoned from such a crime. It also seems to be degrading, that they would be expected to perform worthless and meaningless civilian service, after they have gone through so much.

I would like to state at this time, that I have been tried and found guilty of draft evasion. I am now awaiting sentencing. Eventhough, it has caused great burden on me and my family. I am proud that I chose to be a good and decent man, even at the cost of being a bad American.

Sincerely,

RICHARD A. MAGNEY.

LETTER FROM THEODORE D. MARSH, ENCINITAS, CALIF. (APRIL 24, 1972)

DEAR SIR: * * * —While following the proceedings on amnesty for "draft evaders" by the Senator's subcommittee, it occurred to me that the Senator and his committee might be interested in my experiences regarding the draft and the war.

Let me summarize it briefly. In 1967, in protest of the war and the draft, I turned in my draft card to the Justice Department. I was quickly called up for induction, at which time I refused to step forward. An indictment followed and was subsequently dropped due to errors of procedure on the part of my draft board. Several months later I was again called up for induction and decided to allow myself to be drafted, on the theory that if I survived, my experience in both "camps" might be of some value in healing the wounds of our country.

Anyway, I have now returned from Vietnam and offer my experience for what it may be worth. My personal position regarding amnesty is that the (draft) law was unjust and still is unjust. By and large, the men in Canada and elsewhere followed their conscience in this matter and should be congratulated, asked to come back and be apologized to for the light way in which we have treated their decisions of integrity. We need these men to help rebuild our country. They need no amnesty, because they were in the right.

This in no way reflects ill on the men with whom I served in Vietnam. While there I met many men of stature and integrity, who were there for many and various reasons of their own. To them we owe thanks for helping expedite our combat troops from this ill-conceived war.

If I may be of further help, please feel free to contact me.

Thank you!

Sincerely,

THEODORE D. MARSH.

STATEMENT OF VINCENT F. MCGEE, JR., ALLENWOOD, PA.

A key concept in the national discussion is that of NATIONAL RECONCILIATION. The War in Indochina has affected directly possibly ten million American families. There are lasting scars on all that lost family members in hostility or accident and on all who were living casualties.

The most enduring scars may be those of a psychological nature. The differences over the war have split many homes, friendships and other relationships. Confidence in government has never been so low. Hatred would be healthier than the indifference which now plagues the politics of the country.

A general amnesty, clearly articulating the sufferings to all Americans that the War has brought and the fruits of a positive reconciliation and restored faith in the system amnesty would foster, could serve as the purgative necessary to bring together the aspirations and creativity of the current young generation and the experience and wisdom of the older ones.

The question must be asked if the benefit of conscription has offset the problems and suffering that it has caused in a Nation and under a system of government that has attracted the persecuted of other nations who have fled to our shores from the conscription and religious intolerance of their home country. We, who have taken pride in the title "refuge of the oppressed", have now sent part of a generation in flight from our own intolerance and constraint of conscience.

Many who have commented on amnesty in recent weeks have been more open to the situation of the imprisoned war objector who stood American ground, raised his objection and took his medicine, than to those who fled to sanctuary abroad or deserted from active military service.

The distinction is moot. The suffering that has been part of decision and action within each of these groups is roughly on a par. Those who fled the country had lost hope in their homeland and made their decision without any assurance of legal return. Those who deserted the military discovered the nature of war, and this war in particular, while engaged in actual prosecution of it. They were aware of the usual penalties for their act.

Any decision on amnesty must refrain from close examination of personal motive. Some who fled or deserted and some who went to prison did so with base motive. Saving one's neck was more important than the legal consequences of the steps necessary to saving it. The rule must not be made for the few who really avoided their responsibility. There is at least an equal number—and probably many more—who escaped their responsibility through effective use of medical, legal, or administrative channels.

(This writer has a twin brother who nursed a hernia through seven years of vulnerability to the draft—albeit with some qualms of conscience, particularly after the other half chose non-cooperation.)

The objection that amnesty will foster ANARCHY, a frequent epithet directed at war objectors, is frivolous. At most, those in exile, the deserters, and draft resisters took exception to one law—the Selective Service law or the obligation to remain in active service. Each group bears penalty of their fraction of the law, whether imposed in a Court or not.

Many older people forget that mass civil disobedience during prohibition forced repeal of that law, just as it forced changes in the rights of labor, equal opportunity, and other cherished "rights" which were won.

Another consideration here is whether objection to a war or other questionable program—particularly when a large portion of the nation comes around to the same view—is an actual service to the country or not. To bear the brunt of the opposition to the opposition is a trial. Now, looking back, one may well wonder how much higher the toll could be had objection not brought out the issues and forced reconsideration of the issues and discovery of faulty planning, information and estimates which have plagued the conduct of this military venture. Might the country have been dealt a much more severe blow—in loss of life, limb and treasure—without patriotic opposition?

Upon arrival in prison, most draft resisters are told that there is NO TREATMENT NEEDED. Many are assigned to work in education of other inmates, hospital service, recreation, or other "non-vocational or rehabilitative" work. The assets that they have in education, human concern, and dedication are mostly lost in the prison experience. The horrors of that experience for these strong men of gentle conscience and demeanor sets too many of them against the system and costs the nation, on their release, years of dedication to community service and skill.

Another important fact which many people miss is that the major share of the suffering on one in prison, in exile, or in desertion from the military is borne by the family and community of the person involved. Thus, the community that bears the price is very wide. Most of this community suffers in silence but the mark of it is deep and lasting.

If this community is added to that of those who suffer because of the loss of life and limb in the actual fighting—and who now feel that the war was futile anyway—this community is quite extensive.

No doubt, if an amnesty is enacted or granted, there will be an outcry from certain quarters. But I predict that this will be short-lived and shallow. A far larger community will quietly rejoice and retake an interested and active part in the community.

The biggest problem in America is not opposition to the system from those whom an amnesty would affect, but the apathy which grips an ever increasing segment of the people. This spans all generations, but is most worrisome when it infects youth in general. The future of the country is at stake and ought not be sacrificed for political expediency now.

It is time to bring the nation back together. A nation of strength can afford to be magnanimous and can—and must—grow strong through the participation of youthful opposition and criticism. The loss of an important segment of this generation through continuing recrimination and legal denial would be a disaster. Amnesty would be a major step in the positive direction.

LETTERS FROM MRS. ROBERT A. MERKER, NORTHBROOK, ILL.

(Submitted by Hon. Philip Crane, U.S. House of Representatives, Mar. 2, 1972)

NORTHBROOK, ILL., January 27, 1972.

HON. PHILIP CRANE,
Washington Office,
House Office Building,
Washington, D.C.

DEAR SIR: I am enclosing a copy of a letter I wrote to the Sun-Times in regard to their poll on the subject of amnesty for draft resisters and deserters. I feel they made their choice and they can take the consequences of their choice, just as our servicemen did when they died for the country they loved.

What a difference there must be to be able to go to Canada and see your son, instead of to a mausoleum to see only my son's name on a slab of granite.

Please read those letters to your colleagues in Congress and those Senators who think so little of the sacrifices made by our servicemen who were killed in action. I am depending on you go get my message through. Show them the picture of my son and his bride taken two weeks before he left for Vietnam. Tell them about the fact that he was the best drafting student that Glenbrook North School has ever had. (He was first in drafting competition in the entire state of Illinois in 1965). Tell them what a fine, healthy, young man he was and how much he had to live for. Tell them of The Bronze Star for valor, the other Bronze Star for meritorious service, the Air Medal, the Purple Heart, and the Vietnamese medals, the Gallantry Cross with Palm, and the Military Medal of Merit awarded posthumously for the 30 days in which he was in Vietnam before the helicopter he was piloting was shot down. On behalf of all the grieving families such as ours, who only have pictures and our memories, try to make them understand what a mockery amnesty to deserters and resisters would make of our dead servicemen. How could this country of ours ever ask another wife or mother to give up her husband or son to the service of his country if the resisters and deserters are allowed to return to this country after the war is over? I challenge any Congressman or Senator to look me in the eye and others like me and tell us the resisters and deserters are more important than our dead sons.

I know you will represent me in this message. Thank you for your help.

Respectfully,

MRS. ROBERT A. MERKER.

NORTHBROOK, ILL., January 27, 1972.

ENCOUNTER,
Chicago Sun-Times,
Chicago, Ill.

DEAR SIR: I do not favor any sort of amnesty to the draft resisters and deserters, either now or after the war is over. If anyone is truly a conscientious objector, they could have served in a non-combat capacity and still given time to their country. I feel that we will be at the mercy of foreign powers if they know our citizens are allowed to disregard their country by being unwilling to fight and die for it.

Our eldest son could have resisted the draft too. Instead he enlisted in the Army, became a Warrant Officer and a helicopter pilot. He was killed in action when his light scout helicopter was hit by small arms fire and crashed. He loved this country enough to die to contribute to the safety and well being of it and its citizens.

Why should anyone leading the soft, safe, life in Canada be given extra consideration for their cop-out on their responsibilities as citizens. Let them stay in Canada. This was their choice.

Most sincerely,

MRS. ROBERT A. MERKER.

STATEMENT OF NATIONAL ASSOCIATION OF LAITY, SANTA CLARA, CALIF.
(BOB ALDRIDGE, COORDINATOR)

The President of a national federation of Catholic lay groups today branded the amnesty legislation proposed by Senator Taft as a "pagan, eye for an eye, approach to forgiveness."

"Senator Taft is advocating a guilt substitution plan, not real amnesty to the nation's conscientious objectors," Jack Yorke, President of the National Association of Laity charged.

Yorke's remarks were made in connection with the release of a letter from his organization to President Nixon and members of Congress. In the letter the five year old organization which has affiliates in 24 U.S. cities asked for a presidential proclamation of universal amnesty accompanied by congressional passage of a universal amnesty act. Yorke requested that universal amnesty be extended to all conscientious objectors in the U.S. and abroad "with no strings attached."

"Taft and others are saying to these people: 'Yes, we'll grant you amnesty, but of course you must do this or that in atonement.' That's a form of primitive retribution unworthy of a nation built on secular and religious values," Yorke said.

Yorke cited Presidents Washington, John Adams, Madison, Lincoln, Andrew Jackson, Theodore Roosevelt, Coolidge, and Franklin Roosevelt as using the executive power to grant amnesty. He claimed that war resisters in following their moral convictions assumed the posture which the U.S. extolled at the Nuremberg Trials.

Yorke asked: "Is there any way to measure our nation's loss when we refuse amnesty? No country can afford to close its doors to those who embody so many leadership characteristics, namely, the ability to make a decision no matter how antagonizing, the strength to honor this decision no matter how grave the consequences, and the capacity for human compassion directed by a strong sense of morality."

The National Association of Laity is a liberally oriented federation of 24 Catholic lay groups in the U.S. whose stated goals include the renewal of Church and society according to the principles of Pope John and the Second Vatican Council.

NATIONAL ASSOCIATION OF LAITY,

March 6, 1972.

President RICHARD M. NIXON,
White House,
Washington, D.C.

DEAR MR. PRESIDENT: The National Association of Laity, in consonance with the request of the U.S. Council of Catholic Bishops, petition you, Mr. President, and members of Congress, to grant UNIVERSAL AMNESTY to those who by reason of conscience are in exile, in prison, or awaiting prosecution because of their protest to the Indochina War.

We employ the word Amnesty in a universal context, applicable to all resisters to the Indochina War (not the draft, per se). It would include all those in exile, those who went AWOL or deserted the armed forces, those who were less than honorably discharged, those awaiting prosecution, and those who could be subject to prosecution. Our interpretation of Amnesty is founded on its rightful derivation from the Greek "amnestia . . . a forgetting". It is not to be interpreted in the sense which has resulted from common usage; that is, "pardon for an offense". The UNIVERSAL AMNESTY advocated by the National Association of Laity is one which entails a setting aside of differences on both sides with no strings attached. The legality involved in such a proclamation necessitates initiation of UNIVERSAL AMNESTY by the government. The following is offered as a basis for such action:

1. There are historic precedents for amnestic action. Presidents Washington, John Adams, Madison, Lincoln, Andrew Jackson, Theodore Roosevelt, Coolidge and Franklin Roosevelt used the executive power granted under Article II, Section 2 of the U.S. Constitution to pardon persons charged with espionage and insurrection. Congress passed the UNIVERSAL AMNESTY ACT of 1898.

2. War resisters conscientiously objected to the Indochina War as immoral, unjust and illegal.

3. War resisters in following their moral convictions assumed the posture of that "human tribunal" cited in the following Tablet observations of the Nuremberg Trials (Vol. 188, October 1946, pages 193-194):

"It seems to be the sole purpose of the Trial to emphatically state that when men come into power and perform actions of State, they are liable, if guilty of crimes, to be judged by their fellow humans. No sovereign state or government can cloak itself in 'acts of State' or 'superior orders' thereby avoiding answering for their deeds. Such men can be called to account by a human tribunal."

4. The granting of UNIVERSAL AMNESTY would be a long stride towards closing the gap in an extremely polarized and restless United States. Mutual adjustments of feelings and attitudes are needed to bring about reconciliation. Hard line policies will continue to aggravate an already deplorable situation dividing our country.

5. The proclamation of UNIVERSAL AMNESTY would be a positive step towards alleviating an over-burdened, archaic and ineffective "criminal justice" system.

6. Proclamation of UNIVERSAL AMNESTY can only enhance the international image of the United States. By this demonstration of integrity and un-

derstanding, we will be better able to establish and implement from a forthright, unified and effective base, programs of domestic rehabilitation and assistance in the development of other countries.

7. The loss of human potential to the United States through the acts of the war resisters is immeasurable. No country can afford to close its doors to sons and daughters who embody so many of the most important leadership characteristics; namely, the ability to make a decision, no matter how agonizing, the strength to honor this decision, no matter how grave the consequences, and the capacity for human compassion directed by a strong sense of morality.

Again we emphasize that the granting of UNIVERSAL AMNESTY must not be a token gesture or a "second chance". It must not be punitive but rather an honest attempt to achieve national harmony and a realistic effect to restore justice in our own house. Recovery from the credibility gap will be slow but the mutual acceptance of this Proclamation would do much to create a climate of trust and purpose. The revelations of the Pentagon Papers and the testimony of the Winter Soldiers and others on the Indochina War demand that the justice inherent in UNIVERSAL AMNESTY be applied. Strong leaders must correct injustices as truths are revealed.

We of the National Association of Laity propose that you, President Nixon, address the American people to announce your UNIVERSAL AMNESTY PROCLAMATION of 1972, and that the Congress pass the UNIVERSAL AMNESTY ACT of 1972. Although either one is sufficient in itself, the issuance of both would evidence the unification and solidarity of the Executive and Legislative Branches of our government.

Very sincerely yours,

JACK YORKE, *President.*

LETTER SUBMITTED BY JACK YORKE, NATIONAL ASSOCIATION OF LAYMEN

NATIONAL ASSOCIATION OF LAYMEN,
February 21, 1972.

President RICHARD M. NIXON,
White House,
Washington, D.C.

DEAR MR. PRESIDENT: The National Association of Laity, in consonance with the request of the U.S. Council of Catholic Bishops, petition you, Mr. President, and members of Congress, to grant UNIVERSAL AMNESTY to those who by reason of conscience are in exile, in prison, or awaiting prosecution because of their protest to the Indochina War.

We employ the word Amnesty in a universal context, applicable to all resisters to the Indochina War (not the draft, per se). It would include all those in exile, those who went AWOL or deserted the armed forces, those who were less than honorably discharged, those awaiting prosecution, and those who could be subject to prosecution. Our interpretation of Amnesty is founded on its rightful derivation from the Greek "amnestia. . . a forgetting". It is not to be interpreted in the sense which has resulted from common usage; that is, "pardon for an offense". The UNIVERSAL AMNESTY advocated by the National Association of Laity is one which entails a setting aside of differences on both sides with no strings attached. The legality involved in such a proclamation necessitates initiation of UNIVERSAL AMNESTY by the government. The following is offered as a basis for such action:

1. There are historic precedents for amnestic action. Presidents Washington, John Adams, Madison, Lincoln, Andrew Jackson, Theodore Roosevelt, Coolidge, and Franklin Roosevelt used the executive power granted under Article II, Section 2 of the U.S. Constitution to pardon persons charged with espionage and insurrection. Congress passed the UNIVERSAL AMNESTY ACT of 1898.

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"It seems to be the sole purpose of the Trial to emphatically state that when men come into power and perform actions of State, they are liable, if guilty of crimes, to be judged by their fellow humans. No sovereign state or

government can cloak itself in 'acts of State' or 'superior orders' thereby avoiding answering for their deeds. Such men can be called to account by a human tribunal."

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7. The loss of human potential to the United States through the acts of the war resisters is immeasurable. No country can afford to close its doors to sons and daughters who embody so many of the most important leadership characteristics; namely, the ability to make a decision, no matter how agonizing, the strength to honor this decision, no matter how grave the consequences, and the capacity for human compassion directed by a strong sense of morality.

Again we emphasize that the granting of UNIVERSAL AMNESTY must not be a token gesture or a "second chance". It must not be punitive but rather an honest attempt to achieve national harmony and a realistic effort to restore justice in our own house. Recovery from the credibility gap will be slow but the mutual acceptance of this Proclamation would do much to create a climate of trust and purpose. The revelations of the Pentagon Papers and the testimony of the Winter Soldiers and others on the Indochina War demand that the justice inherent in UNIVERSAL AMNESTY be applied. Strong leaders must correct injustices as truths are revealed.

We of the National Association of Laity propose that you, President Nixon, address the American people to announce your UNIVERSAL AMNESTY PROCLAMATION of 1972, and that the Congress pass the UNIVERSAL AMNESTY ACT of 1972. Although either one is sufficient in itself, the issuance of both would evidence the unification and solidarity of the Executive and Legislative Branches of our government.

Very sincerely yours,

JACK YORKE, *President.*

STATEMENT SUBMITTED BY THE U.S. NATIONAL STUDENT ASSOCIATION,
WASHINGTON, D.C. (MARGERY A. TABANKIN, PRESIDENT)

Amnesty has become a popular topic of debate with the supposed winding down of the war. Clearly the issue of amnesty is an important one, to be resolved along with other considerations raised by the Vietnam War. We believe that the complexities of the war are so great as to defy computation, and that those who refused induction or otherwise resisted participation in the war should not be punished for pursuing what they believed to be the only honorable course of action. But we are concerned lest a limited discussion of amnesty obscure the other and broader issues of the war. We are torn between two perceptions: on the one hand, we realize that amnesty must be raised as an issue in order to create a political climate in which it can be rationally discussed. On the other, simply because amnesty has historically been extended at the end of a war, we are afraid that a discussion of amnesty at this point might be premature and incorrectly create the impression that the Indochina War is ending. We believe that amnesty should be extended to resisters, we believe that the Nixon Administration should end the war. But the first cannot happen without the second, and the second does not seem to be happening at all. In fact, all available evidence points more towards an escalation than towards a conclusion.

We speak as students and as young people, because we think that a youth perspective should be brought to bear on the discussion of amnesty. For the most part, those who would be most directly affected by an extension of am-

nesty, either conditional or universal, have not been consulted. Most people will agree that the majority or all Vietnam War resisters are members of our generation, and consequently we believe it our responsibility to see that our brothers and sisters are treated fairly. This statement is not meant to constitute a way in which this nation can absolve itself of the crime against humanity the war represents. Instead, it is meant as a first step toward a realization of our responsibility, to our friends, our brothers and sisters, and our whole generation.

There are reasons which might best be described as politically expedient to support a demand for amnesty. In the long, troubled years of the Vietnam War, few communities have escaped the tragedy of lives lost and careers interrupted; few communities have been spared the tensions of dissent and disillusionment. Our leaders, on the whole, have aggravated rather than alleviated the differences among us. The complexities of imputing blame and ascribing honor grow with each new revelation about the origins and purposed of the war. As we debate issues that seem increasingly insoluble, the problems of turning our society's energies and resources away from war and towards social justice become more acute. We can ill afford to waste more time arguing about the rightness or wrongness of individual responses to the war if we are to heal those differences and return this nation to a singleness of purpose in its pursuit of justice.

For pragmatic reasons, then, we feel that a call for amnesty is justifiable, as a way of reunifying the American society, not in forgetfulness but in acceptance of responsibility. Reordering priorities and realigning resources is a massive task, but we perceive a starting-point in the extension of amnesty to all individuals who resisted participation in the war. This is not to say that theirs' was the only honorable response to the moral dilemma posed by the war: we recognize and respect the integrity of many who chose to fight as the only justifiable course of action. But we believe that those who chose to resist acted with equal justification, and should not be made to bear the legal responsibility for a nation's confusion. We say: let the exiles in Canada and around the world return to the United States free of legal impediment. Let the military stockades and federal penitentiaries be emptied of those convicted, or currently awaiting trial for, their refusal to support the war. Let the military and civil records of all resisters, deserters and dissenters not be held against them. We need their talents and energies too badly to tolerate a class of political exiles in our midst.

But there is a moral imperative involved here, too, and it far outweighs the politics of expediency. And that is why we support a universal amnesty that is unconditional, automatic and non-punitive. We call for universal amnesty for all those who resisted the Vietnam War in whatever form. Let there be no mistaking precisely what this means: to call for universal amnesty is not to "forgive and forget." To forgive and forget is to reject the responsibility that we as a nation must bear for the brutality and destruction we have perpetrated on the peoples of Southeast Asia. To forgive and forget is to leave open the possibility that this nation might again embark on a disastrous foreign policy such as the one which dictated American involvement in this war. And we must never allow such a war to be waged.

On the contrary, we must force this nation to recognize and accept its responsibility for the war and its aftermath, and to understand that part of its aftermath is a generation of political exiles: exiles because they refused to participate in a war against which their individual consciences argued, and against which most of the American people's sentiments have turned. Exiles because they refused induction, or fled the country, or deserted the military, or were dismissed from service with a less than honorable discharge, or otherwise violated civil or military codes in protesting the war. Exiles because the American government persists in prosecuting and imprisoning them. Exiles because employers reject them, communities harass them, and the American people refuse to accept their collective responsibility and insist on placing the sole legal responsibility for the war on the very people who refused to wage it.

And we cannot forget that these people, at very great personal sacrifice, awakened the conscience of the American people. They maintained the war as an issue before the eyes of the public. They countered every instance of Administrative duplicity with their own personal statements, quiet or dramatic, of the truth. In the 1960's, while many of us trembled to put even our per-

sonal or political credibility on the line to oppose the war, they put everything on the line—their homes, their families and friends, their careers, their freedom, their honor. We would betray their convictions if we proposed to the American people that they forgive and forget. On the contrary, we insist that a universal amnesty would have such far-reaching ramifications that, far from obliterating their records and forgetting the crisis of conscience through which the war forced them, the whole society would be compelled to bear the burden of conscience these men and women now carry.

SCOPE

Many categories of resisters and dissenters would be covered by a universal amnesty. Resisters who fled the country or went underground, and accepted exiles rather than bear arms, constitute the category on which the most emphasis is placed by legislators and the media. There are between 70,000 and 100,000 young Americans exiled in Canada or abroad who are unable to return to the United States without facing prosecution. They should be allowed to return to this country free of legal impediment. There are some 8,500 resisters who either are serving or have served sentence in federal penitentiaries for refusing to register or accept induction; their sentences should be terminated and their records wiped clean. There are hundreds upon hundreds of men and women who have been prosecuted, fined and/or imprisoned for civilian acts of resistance to the war. Their sentences should also be commuted, and their records likewise wiped clean. *That is not to say that in erasing the legal stigma from their records, we should erase their stories:* the witness they bore to the American people should be preserved as our best assurance against just such a future war as this.

There are other categories of resisters who receive less press coverage and less public sympathy, and we are particularly adamant that they be included in a universal amnesty. Apparently the media finds something more romantic, or at least more newsworthy, in the plight of the resister in jail for clearly articulated reasons of conscience, or the fate of the exile in Canada who fled his country rather than register or accept induction. And yet there are thousands of men who are currently serving time or awaiting trial in military stockades for violations of the military code, or who were dismissed from the military with less than honorable discharges, or who deserted the military, all of whom should be included. These men have been unjustly excluded from consideration under most of the pending amnesty bills, an exclusion apparently rationalized by maintaining that many of them violated the military codes for reasons other than direction opposition to the Vietnam War. That is, we believe, a bogus argument. There is a direction relationship between America's aggression against the people of Indochina and its repression of servicemen. In a society where the government allows its citizens' constitutional rights to be abrogated by the military, there should be little surprise when it abrogates the most basic human rights of people abroad. Viewed from that perspective, it seems clear and reasonable that opposition to a repressive and inhuman military is a corollary of opposition to that military's repressive and inhuman activities abroad.

There are yet more serious reasons for insisting that those who violated military codes during the course of the war be included in a call for universal amnesty. We will be very specific about this: for every young man from a middle-class background who had the benefit of a student deferment, or access to financial resources and legal counsel to secure a conscientious objector status or otherwise avoid induction, there is a young man, often from a poor or working-class background, often non-white, who was inducted in his place. For every young man who had the benefit of an understanding draft board that supported his case against induction, there is a young man who had to face wholly unsympathetic and often racist board that forced him into the military. Most young people who were successful in their fight to avoid induction recognize that theirs' was a luxury afforded to few in this society, and we believe they share our conviction that men not so fortunate as they should be fully exonerated and recompensated.

And there is a case to be made, too, for men who willingly entered the military and only later realized that their consciences would not permit them to perform the actions their superiors demanded. If we as a nation have come only so lately to a realization that this was wrongly conceived and shame-

fully fought, can we in all conscience condemn the soldier who arrived at that conclusion after he was in service? There should be no differentiation between the draft resister and the military deserter or the dishonorably discharged. The issue is not whether one is more or less guilty for following the dictates of his conscience at an earlier or later time in his life; the choice they have made is essentially the same. Why should these men shoulder the responsibility for the war, when the country as a whole has not yet truly accepted its moral responsibility for destroying a country and its people for generations to come in the name of freedom?

The question, then, is not one of who shall be included, but who shall be excluded, from a universal amnesty. A universal amnesty is by definition one with the broadest possible scope, and should exclude only those who are actually responsible for committing war crimes and those who committed a crime against human life.

METHOD

We believe that universal amnesty should be extended as soon as possible, and no later than the conclusion of hostilities in Southeast Asia, whether that truce be declared or *de facto*, and that such amnesty should be automatic: that is, the declaration shall be immediate and comprehensive and without the intervention of any board or commission. We are strongly opposed to making the extension of amnesty a case-by-case process of examination and judgment. In the first place, a case-by-case examination and judgment would clearly tie up any commission in red-tape for generations to come, simply by virtue of the sheer numbers involved. In the second place, because our perception of universal amnesty is based on the proposition that *all* Americans must shoulder the responsibility for the war, we doubt that there is any board that is qualified to sit in judgment upon resister, deserters and dissenters. And finally, such a case-by-case approach would place at a great disadvantage those men and women who did not have access to proper counsel and advice, or who, for one reason or another, were not as adept as others in articulating their individual cases.

Instead, we believe that only an immediate and automatic extension of amnesty would be a fair and honorable way of resolving the hundreds and thousands of cases that would arise in the event that amnesty became a reality.

NONPUNITIVE AMNESTY

We do not find acceptable any proposal about a punitive amnesty which would require resisters, deserters, the dishonorably discharged, and the dissenters to perform some form of alternative service as a way of discharging his or her obligations to society. On the contrary, a universal amnesty is a small first step towards recompensating these individuals for the personal sacrifices they were compelled to make in responding to the moral dilemma raised by the war. Furthermore, it is understandably questionable whether the majority of these individuals, who assumed the stance they did because it was the only possible moral response, would sacrifice their convictions and accept public penance, and thus tacitly acknowledge guilt. The only acceptable amnesty, then, is an unconditional and non-punitive one which is not so much grounded in a willingness to forgive but a desire to recompensate.

CONCLUSION

It has been said that the United States government could not logically extend a universal amnesty without calling for the resurrection of the dead. That is perhaps true, but only if in calling for the resurrection of the dead as a form of amnesty, we remember that the Vietnamese dead are surely as deserving of recompensation as are the American dead. We mourn the dead, mourn them as victims of a misguided foreign policy, and surely there is a little part in each of us that wishes we could erase all the effect of the war. But we know we cannot wish away what was, any more than we can ever permit ourselves to forget what was and is. And like Mother Jones, we feel compelled to pray for the dead and fight like hell for the living. Securing a universal amnesty for our brothers and sisters is one component of that struggle.

And so we call upon the Congress to prepare itself for the enactment of amnesty legislation, but to recognize that their primary responsibility at present

is to enact legislation that would force the government to withdraw all U.S. troops—ground, sea and air forces—from Indochina, and to withdraw all other economic and military support from the present Saigon government. And we call upon the President, and all who would be President, to support the movement for amnesty as a step towards healing the division of the American people, but to recognize that the first step towards true reconciliation can only be the conclusion of the war. And finally, we call upon the American people to understand that mutual pardon in the form of amnesty is crucial to the restoration of unity in our nation, but to recognize that the forgiveness of the Indochina people can only be won by rapidly and wholly removing the burden of war which we have visited upon them for so many years.

LETTER FROM DON B. PRATT, MILAN, MICH. (MAY 15, 1972)

EDWARD KENNEDY: The following is a statement on amnesty written by myself in January of this year. This is the statement you mentioned for printing in the hearing record of the subcommittee on Administrative Practice and Procedure. (May 10, 1972) :

There is an ever growing popularity in the issue of amnesty for exiles and draft resisters, including deserters. The concerned may not be a majority of the populace, but it's certainly a concerned portion thereof. For that concern I am thankful.

But the thought seems to be that the war is ending and thus the reason for exile and imprisonment ending as well. This is where an illusion lies.

As one of the currently imprisoned, I feel that neither this nation's involvement in Asiatic wars nor the discriminatory and authoritarian method of raising and financing armies is ending.

Maybe troop levels are reduced due to opposition to the war, both outside and within the Armed Forces, but as stated in many ways and shown in actions by the Nixon administration, the intention to "win" and maintain such wars is still with us.

The cost in money and in lives continues as long as the irrational fear of "defeat" reigns within U.S. foreign policy-making circles. The support of such costs will be demanded by war profiteers and professional mercenaries. Within this country they are aplenty.

Amnesty will wait for the consent of these controlling sources and therefore is not probable. Assuming it is possible then its terms and conditions are the next subject at hand.

A lot of people talk of alternative service being imposed on "returnees." Others may think of other forms of conditioned pardon, but any pardon and its conditions must be thought of in terms of what will be the potential recipient's response.

If the claim is true that exiled, deserting and resisting young men were concerned only with their own advantage then only such types who are more selfish will return if a "bargain" for returning is established.

Most importantly those exiled and imprisoned who believe the nation's laws and war are wrong *want not* forgiveness but a conscious and conscientious nation, including themselves.

Because it sounds like "The U.S. Government cannot give us amnesty." a good many people don't understand. Some even call it arrogance. What is being said is that exiles, deserters, and resisters believe it is the government that is wrong not themselves and that the American people including themselves, have been fooled, lied to, and used.

In addition, we resent and oppose being *dictated* as to how, when and/or where (mandatory alternative service) our lives will be so used—dictated to us or dictated to others.

To those who say it's arrogance we show, it may be but it is concerned arrogance. The idealism many people believe possible cannot be accomplished or upheld with involuntary service, coerced or forced, for any of mankind.

Some say that freedom is a state of the mind. We, as exiles, deserters, & resisters, hope not, for if that is all freedom is or all it can be then our efforts are in vain.

Amnesty for our nation's leaders is what we should be talking about.

Love, peace, joy, hope, and truth,

DON B. PRATT.

LETTER WITH ENCLOSED ESSAY FROM SCOTT L. SIEBERT, WASHINGTON, D.C.

(FEB. 29, 1972)

DEAR SENATOR KENNEDY: In light of your current *hearings* dealing with the question of *amnesty* for those who have refused military service, please permit me to send you a rough copy of an essay I wrote for a Masonic publication.

As the psychiatric consultant to the Office of Naval Disability Evaluation, I come in daily contact with case reports of men not suited emotionally for the military. The assumption is made that all young men can serve in the military. Our experience in W.W. II revealed that 1.7 million men were refused induction for emotional reasons! Surely all are not able to serve, and such an opinion comes not from only reading reports, but from working directly with those who have left the military and have either returned or been returned.

Thank you for your attention.

Sincerely,

SCOTT L. SIEBERT, M.D.,
Lcdr. MC, USN.

WHAT PRICE PATRIOTISM?

At twenty-eight I feel that I stand at the crossroads of the often sighted "generation gap." On the one hand I am the product of the public schools when daily prayer, bible reading, and the Pledge of Allegiance were the rule of the day, while on the other hand, I am not so long removed from adolescence and college days that I have forgotten the frustrations, enthusiasms, rebelliousness, and uncertainties involved in the process of maturation. As a psychiatrist, I have been trained to observe and attempt to understand human behavior, while as an individual, I will find my own motivations questionable and my behavior frequently generated by emotion rather than logic. As a military officer, I am expected to function for the good of the whole, while as a citizen, I recognize the need to value the individual, at times, above the whole. Undoubtedly, life for all of us is a continuing assortment of crossroads, always necessitating contemplation of a choice and ultimately a decision to pursue one path of action or belief over another. Therefore, while I am at the crossroad of young versus old; professional versus individual; military versus citizen, I would direct myself to the question of "What price patriotism?"

As a military psychiatrist, I often have occasion to view the adverse effects of enlisting men into military service. My remarks regarding these adolescents are made without any reference to the Vietnam situation, since most of what I observe is unrelated to combat in general or Vietnam as a moral issue in particular. But rather I would address myself to the issue of what we demand of adolescents regarding military service under the label of "patriotism," and the effects of such demands upon them.

What I see are young men forced into military service either by the draft or the fear of it. Many of these boys found it difficult to adjust to the more relaxed requirements of home and school, let alone adjust to military standards. I see many of them as frightened, dependent, disorganized, rebellious, and insecure boys who have not the emotional resources to function in the military. But, the military pressures that they "shape up"; the family pressures them to serve "proudly"; their future ambitions and employment are in part dependent upon the "honorable" discharge; and society dictates that military service is their "patriotic duty." That these requirements can not be met by every American male is evidenced by 1.7 million men having been rejected for military service in World War II for emotional reasons.

Americans, I think, over-react to the boy who says, "No, I won't go to the Army." Undoubtedly he has long hair, perhaps a beard, mod clothing, or a rebellious attitude. You hear it said, "They should be shot." and they are; "They should be in jail." and they are; "They should be drafted anyway," and they are. I do not suggest that they are right and that what they do should go unpunished. I only imply they are the fortunate ones. To be considered unpatriotic is an indication of their independence, even though we may consider it "sick" or "immature." They can express themselves and endure the consequences. They hold up under pressures from family and society even though the price is often high. The adolescents that finally make their way into my office have paid a higher price for their "patriotism." Some of them have given their sanity for the goal of patriotism.

What we ask of the adolescent is compliance with our standards, a surrender to our ideals, and a call to fight our battles. Regardless of his individual objections, his fearful reluctance, and at times his open rebelliousness, we demand he be a patriot. And in terms of human value, when figures clearly tell us that every one can not serve; when experience teaches that every one can not be the patriot in our terms; and when youth pleads to be at least heard, why do we close our ears, our hearts, and our minds under the guise of patriotism?

Being Masons we take pride in the fact that most of the great men responsible for this country and our continuing way of American life were tutored in ideals and philosophies of Free Masonry. We, as Masons, draw a close connection between their Masonic background and their devotion to their country. And rightly so. Patriotism and Masonry do fit hand in glove, and are expressed as such. Brother Washington is a fine example of such a parallel. But, I would ask you to reflect upon the lessons of the Blue Lodge, the cornerstone of all Masonry. Immediately, I am sure you will grasp that the question of patriotism is never addressed. Belief in God, dedication to our proper life's work, respect for our fellow man, and unity of the Craft are the primary teachings. The three great Lights of Masonry include no flag, no political doctrine, no emphasis on Nationalism, and no requirement of patriotism.

It is easy to forget that the type of man who seeks to become a Mason, is also the type of man who most likely holds respect for his country and the principles upon which it was established. For to be a Mason, a man must respect the virtues of equality, trust, loyalty, devotion, reverence, honesty, confidence, liberty, and faith as he needs each to ensure the harmony and unity of the Craft. We are fortunate that the teachings of Masonry are in accordance with the principles of the Declaration of Independence and the Constitution. If they were not, then where do Masons stand? With Patriotism or with Masonry? Let us pray we never have to make such a decision, but remember, that Brother Washington, as well as others, had to make a choice. He, along with the others, chose to lead a rebellion, to be a revolutionist, and to be a traitor to the Crown. I should like to believe, that such a decision was partially based on the Masonic principles taught to him and held revent by him rather than based solely upon Nationalism and "Patriotism".

As Masons I suggest we have to daily adjust our goals to view the value of the individual. Such should not be a hard task. The Mark Master Mason's Degree of the York Rite (In some jurisdictions, the theme of that degree is covered in the Blue Lodge), teaches that the odd shaped stone, first rejected and discarded because of its appearance, eventually was needed to complete the arch and add stability to the structure. Thus it should be with all Masons. Evaluate the individual and judge his potential on his merits, rather than discarding or attempting to place him into a space for which he was not designed. The Keystone was discarded not because it lacked importance, but because of the ignorance of those who discarded it. Such is the case with our adolescents. All adolescents do not fit into our "arch" titled "military service and Patriotism", but by the same token, they may be the Keystone needed for another arch of an equally valued ideal.

STATEMENT OF GLENN R. SIEGAL

Since 1965, over 2.5 million Americans have served in Vietnam. 55,000 died. Several hundred thousand were wounded. Hundreds are POW's or MIA's. 70,000 did not serve in Vietnam, but rather chose to risk the 'dangers' of life in Canada, rather than take the easy way and serve with the rest of us. The overwhelming majority of American troops served honorably and proudly. At a time when our involvement in Vietnam is rapidly phasing out, we find ourselves being asked to grant amnesty to those who sought to flee their responsibilities. As a veteran who is proud of my service, I am utterly appalled that the topic of amnesty is even being considered while 130,000 American troops remain in Southeast Asia. I am appalled that this hearing is taking place while hundreds of Americans are caged and chained in communist prison camps. I do not object to discussing amnesty—after our troops are all withdrawn, and our POW's and MIA's are returned alive,—but to lend the prestige

of the United States Senate to this subject now, is a slap in the face to those who served or are now serving honorably in Vietnam.

We did not take it upon ourselves as individuals to go to Vietnam. Our leaders, men whose judgments we believed, told us that the defense of South Vietnam was consistent with our traditions and ideals. Isn't it ironic that these same would-be statesmen who were the architects of our policies in Vietnam, now beat their chests and plead for forgiveness? These same summer strategists, who sent us into combat in the swamps of Vietnam with our hands tied behind our backs, have turned their backs on us amidst the winter fury of anti-war protests, and would now add insult to injury by condoning the actions of that small group who chose to flee.

There are two primary reasons for my opposition to amnesty. First, is my concern for our POW's. During my tour in Vietnam, the fear of capture was stronger than the fear of death in combat. I can think of very few things that would destroy my will to resist more completely than to learn that draft dodgers will be welcomed home while I remained a prisoner, apparently forgotten by my country. I ask you to put yourself in the place of a POW; You have been a prisoner for up to five years. You have been denied even the minimum humane treatment guaranteed by the Geneva Convention of 1949. You have undergone countless hours of physical and mental harassment, designed to make you denounce your country and what it stands for. You have been subjected to bitter attacks by some of your own countrymen, who call you a war criminal and that you got just what you deserved. And now, your captors read to you from your own press, that those who risked nothing, endured no hardships, apparently rate better treatment than you. Can you imagine the blow to the morale of a POW? These are the men who should be asked about amnesty.

My second reason for opposing amnesty is my belief that the problems of the Vietnam Veteran are much more important than the inconvenience self-imposed exile has caused the draft evader. An article in *The Evening Star*, 29 January 72, points out the magnitude of the problem . . .

"The Vietnam Veteran faces a cold public reception compared to veterans of previous wars. His problems are greater, benefits are comparatively fewer, . . . Unemployment among 20-29 year old veterans is 33% higher than for non-veterans . . . All veterans experience general discrimination related to disaffection about the war. People also express fear of the potential for violence the veteran may display. They also fear he may be a drug user."

Those who answered their nation's call have priority on the nation's time and resources to help them meet their problems. Those who fled to Canada now want to come back and enjoy the rights and privileges which life in the United States bestows. I urge you to place the needs of the more than two million who did not shirk the responsibilities over the desires of the small minority who did.

Also consider that the evaders are demanding that the nation assume their guilt. We are not law-breakers, they are. The evaders have made it clear that they will accept no imputation of criminal guilt, but rather we must beg them to return in triumph. To give in to this demand would be to make a mockery of our service.

America does not need to be granted amnesty. We should honor those who served not those who fled.

LETTER FROM ROBERT E. JONES, JOINT WASHINGTON OFFICE FOR SOCIAL CONCERN
(MARCH 14, 1972)

DEAR MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE: I write as Executive Director of the Joint Washington Office for Social Concern, representing the American Ethical Union whose national headquarters is in New York, the American Humanist Association, with headquarters in San Francisco, and the Unitarian Universalist Association, whose continental headquarters is in Boston.

The American Ethical Union, the Division of Humanist Involvement of the American Humanist Association, and the Unitarian Universalist Association, all wish to be recorded in favor of an unconditional amnesty for those young men who, in the exercise of their conscience, chose jail or exile rather than military service during the Indochina War.

We are presenting this joint statement because we have nearly identical position on this draft and amnesty, and because our religious positions are similar. All three groups take as their basic tenet a faith in freedom. We grant to our members individual freedom of belief, feeling that in matters of religion the individual conscience must be sovereign. We are, therefore, churches or religious associations without a fixed religious creed or dogma, though our members have a broad consensus of belief with respect to the ethical and moral approach to social questions. We are not in the category of "peace" churches; rather our members hold a range of positions on the questions of participation in war, including the pacifist position but not excluding members who support the use of force when deemed necessary in international relations.

We have reached the position, today, that the best interests of the United States and of its citizens will be served by the granting of amnesty to those individuals who have been exciled or jailed by the unfortunate circumstances of the last few years, namely, the Indochina War.

The general trend in the social and political climate of the United States is one of opposition to a war which is now felt to have been a tragic error, and an immoral intervention by the United States in the internal affairs of other nations. We concede that amnesty will probably not be possible until the war is virtually ended, or until the authority to induct men in the armed services has expired. However, this does not mean that substantial and important congressional action is impossible or untimely at present to begin the reconstruction of unity within the country.

We are concerned with the inequities of the draft and what amnesty might mean in those terms. Probably, a true amnesty would have to wait for the draft to end and for the initiation of a voluntary army. This is necessary to avoid the inequity between some men being called to serve and serving, while others, who because of their conscience evaded service, are forgiven.

But an amnesty should be granted at the first possible moment and Congress should so stipulate.

The persons involved were nourished in the American ideal of freedom of thought and action. Having made a personal moral and ethical decision, the draft resister chose to follow his conscience in an affirmation of life rather than acquiescing in what he felt to be a life-destroying and immoral situation. These have not been overt acts of aggression or treason against the U.S. Government, but the exercise by individuals of freedom of thought and conscience and by reason of that thought and conscience to act in a manner whereby the individual could retain individual integrity. When the situation is such that a large number of directly involved persons are not obeying the law—in this case young men of draft age—then it does not necessarily follow that those persons are consciously conspiring to destroy the mechanisms behind that law. It may well be that the law or the system itself is to blame for forcing individuals to take a stand whereby they must break the law. Ending the draft would do much to diminish this personal dilemma as well as the division within our country, but the question of the seventy-odd thousand draft evaders, the five hundred serving prison sentences, and the many thousand more deserters will still be unanswered. Amnesty is the single form a government has to approach this latter problem.

There are substantial precedents in this country regarding amnesty. In most cases it was granted after commission of open act of violence or treason against the government as after the Civil War. Legislative proposals offered in the Senate and the House which contain a work requirement are not amnesty and we do not find them acceptable. These bills are a means of punishing men who decided that the war was morally wrong and that there was no security threat to this country, in many cases, long before political leadership made the same judgments. Public opinion and political leadership has finally caught up with the general antiwar sentiment these men had expressed, perhaps, "prematurely." It would be unjust to continue to punish men whose consciences impelled them to think the unthinkable, that their country was engaged in an unjust war, before the majority had reached that conclusion.

We realize that in the draft as in society, inequities are inevitable. However, the argument that some will "get off easy" while others fight and die for their country is difficult to justify, particularly in light of recent wars (Vietnam, Korea). Since 1948 there have always been more men available than were needed or drafted; and today, the lottery helps the local board choose one man for possible death, many more for life.

The arguments against amnesty: that if it were granted the desertion rate would go higher; that it would destroy the viability of a draft or of a future draft; and that it would make a volunteer army impossible, are plausible. But, the sheer numbers of deserters and draft evaders would seem to attest to the fact that these arguments are already growing realities for the military and the government, and that drastic changes are needed within the system.

Withholding amnesty for reason of inequities or deficiencies in the system is cruel justice for men who realized and fled from or rejected the deficiencies. Why must we persecute a select group of Americans, the young, while there are many others just as strongly opposed to the war who, but for the fact of their age, are free of having to make the terrible choice of conscience or expedience.

The problem of who should receive amnesty could be long debated and it is possibly too difficult and too complex a situation to ever resolve completely. However, the point of amnesties has always been to erase the slate; to "forget" and to start all over again. Amnesty would be a form of admitting the errors on all side, of accepting the complexities involved in the world situation of the last decade, and it would be viewed as a desire to begin anew in building a unified nation with a devotion to national and international peace.

It is time to admit that possibly those individuals who became self-exiled were gifted with a sharper insight to the terrible consequences inherent in military conscription in contemporary society, and in the disaster of the Indochina War.

These men operated as morally free agents on values which our society has pledged to foster, placing human dignity as the highest requirement in their lives. With popular sentiment of the Indochina War being what it is today and with the war winding down, the truth of the draft evaders action must be recognized and ways must be found to allow them to return.

Attached are Resolutions of the American Ethical Union and the Unitarian Universalist Association, dealing with the matter of amnesty. The Public Affairs Committee of the American Ethical Union, in its meeting of March 7, 1972, reaffirmed its position on amnesty and asked for total, unconditional amnesty.

Sincerely,

ROBERT E. JONES,
Executive Director.

AMNESTY FOR WAR RESISTERS

WHEREAS, the present Selective Service Act denies recognition to conscientious objectors whose claims are not based on "religious training and belief" and also denies recognition to those who distinguish, often on a religious basis, between morally acceptable and morally unacceptable warfare, and

WHEREAS, some conscientious objectors also believe that cooperation with the draft law, itself, would violate their consciences, lend support to a morally repugnant war, and sanction involuntary servitude in violation of the Constitution, and

WHEREAS, as a result of this law thousands of Americans who have conscientiously resisted military conscription and service or engaged in non-violent symbolic acts of protest against it are now in prison, awaiting trial, in voluntary exile, or suffering other severe handicaps, and

WHEREAS, there is precedent in the United States for amnesty to heal divisions and to restore persons to useful citizenship who have refused, for reason of conscience, to cooperate with the Selective Service System or the armed forces: Therefore, be it

RESOLVED That the 1969 Assembly of the American Ethical Union call upon the President of the United States to grant amnesty to all those who have for reasons of conscience engaged in non-violent symbolic acts of protest against the Selective Service System, refused to cooperate with Selective Service, or refused induction into or continued service in the armed forces.

Adopted by the General Assembly of the American Ethical Union, March 1969.

AMNESTY AND REPATRIATION FOR WAR RESISTERS

Because: the Canadian Council of Churches 1969 estimate of the number of United States military refugees and draft resisters was 60,000 with projections of 20,000 per year together with substantial numbers of similar expatriates in other countries; and

Because: most of the young men left the United States after a decision of conscience over the prospect of assisting in an illegal, immoral Vietnam War; and

Because: Unitarian Universalists respect such demonstrated allegiance to personal conscience and to the affirmation of life;

Be it resolved: The 1971 General Assembly of the Unitarian Universalist Association direct its continental offices in Boston to use its powers of advocacy to bring about enactment of United States legislation which grants amnesty and repatriation to those men who are in prison or in self exile by reason of refusal to serve in the Vietnam War; and: *Be it therefore*

Resolved, That the 1971 General Assembly of the Unitarian Universalist Association affirm its support of the efforts of the Canadian Unitarian Council to raise funds from Unitarian Universalist societies and individuals to aid in ministering to the needs (physical and spiritual) of American expatriates.

Adopted by the Tenth General Assembly of the Unitarian Universalist Association, held in Washington, D.C., June 11, 1971.

STATEMENT OF THE UNITED CHURCH OF CHRIST, NEW YORK, N.Y.
(ROBERT V. MOSS, PRESIDENT)

I am very pleased that you have held hearings on amnesty. It is necessary for our nation to explore the best way to implement amnesty. Your hearings have been a necessary first step toward this.

The United Church of Christ has given much thought to amnesty. In 1969 the General Synod of the United Church of Christ adopted the brief but comprehensive statement on amnesty given below:

AMNESTY FOR WAR OBJECTORS

In the interests of reconciliation and the binding up of wounds, for the sake of our freedoms and to show our high respect for conscience, in the best tradition of a strong and secure democracy, and in the name of Christian love,

We urge the President of the United States to grant, at the earliest possible opportunity, amnesty and pardon for those who for actions witnessing to their beliefs have been incarcerated, deprived of the rights of citizenship, or led by their conscience into exile during the course of the nation's great agony in the Vietnam war.

We urge these bold actions because this nation needs, and is strong enough to embrace, both those who have engaged in the Vietnam conflict and those who have opposed it.

Prior to its adoption by the General Synod, the proposed statement had been mailed out to every congregation. We wanted the wisdom of all of our people on this issue. Discussions were held. The findings and recommendations were reported to the General Synod of the United Church. A public hearing was held, and in due course the statement was adopted.

Several comments are in order.

1. Amnesty is a sign of the strength of the nation, not its weakness. A nation is strong when it cherishes acts of conscience, particularly the act of conscience which courageously resists the policies and practices of the state which seem to that conscience to be immoral and unjust. Without those acts of courageous conscience the political process degenerates into total irrelevance, or into demagoguery which could lead to fascism.

A nation is strong when it extends pardon and forgiveness to those who have broken laws designed to implement policies and practices which the nation itself later refutes. It is a small act of charity and kindness to welcome them back into full life.

A nation is strong when it brings into full participation in its life all of its citizens, particularly men of conscience. We need now and in the future the insights and wisdom about our life and future which these men have to offer. We will be impoverished without them.

2. Amnesty in no way impugns the motives of the service of those who served in this war, were maimed by it, or gave their lives. Indeed, if there is to be an amnesty perhaps it should be extended to all of us, churchmen, citi-

zen, politician, soldier, whose acquiescence and silence made possible the massive destruction and suffering of the Indochinese land and people.

3. Amnesty in no way encourages lawlessness. On the contrary, it derives from the profoundest respect for the law. The law is never an abstraction apart from the people. By returning to full participation in our life those who acted in the name of a higher law—the law of conscience which never can be totally commanded or bound to the state—the respect for the laws of the state are enhanced and strengthened.

4. Amnesty and pardon go together. It should be complete and total. Bills such as those introduced by Rep. Koch and Senator Taft which require two years of service by those who have by acts of conscience gone into exile should really be labeled bills for 'reentry into U.S. life', *not* 'amnesty'. The strong nation is gracious and unconditional in its extension of mercy.

5. Amnesty must be considered in the proper context. It is not possible until the war in Indochina is ended and the authority to induct is removed. But consideration of it and preparation for it, can be initiated now.

6. There is danger that the current talk about amnesty may contribute to the illusion that the war in Indochina is over. The massive air raid, the high level of civilian casualties, the large number of refugees point to the continuation of the human toll of this war. The color of the corpses has been changed, but the corpses continue.

7. Ending the authority to conscript is a necessary prerequisite to amnesty. It makes little sense to grant amnesty to those who have broken laws which others are still required to obey. The draft is an alien institution in our life. Throughout our history thousands of people immigrated to the United States to escape military conscription. Today that is changed! Conscription is a cancerous part of the fabric of our nation which must be removed.

The General Synod of the United Church of Christ which adopted the statement on amnesty also said, "The only justification for military conscription is an emergency . . . to be determined not by executive fiat but through a declaration by the Congress as the major representative of the people."

There is now no national emergency justifying the continuation of conscription. The situation for ending the authority to induct in 1972 is favorable. At the moment, no one is being drafted (unfortunately, that is soon to change). The army is releasing 140,000 men prematurely to achieve its authorized ceiling by June 1972. The recruitment program is successful. Increased pay is attracting youth, among whom there is high unemployment. The Pentagon, desperate to keep the authority to induct even though not using it, is now talking about drafting reserves. Senator Hatfield, in introducing his amendment to cut off inductions on July 1, 1972 indicated there may actually be a surplus of volunteers next year.

CONCLUSION.

We favor amnesty "at the earliest possible opportunity." We believe that this requires the ending of the war and of the authority to conscript. We recognize that granting amnesty is a small but necessary part of the reconciliation necessary to heal the nation's wounds resulting from the agony of Vietnam. It does not constitute complete atonement for our responsibility in the war and it does nothing for the people of Indochina; but it will strengthen our nation by restoring into full citizenship men of conscience to whose witness we are all indebted.

ROBERT V. MOSS,
President, United Church of Christ.

STATEMENT OF JOE GARCIA, DIRECTOR OF VETERANS AFFAIRS, SEATTLE, WASH.

Thank you, members of the committee. The less than honorable discharge imposes a life-long badge of inferiority disqualifying veterans from federal employment, substantially damages their prospects for private employment, and fixes upon them the stigma of an official defamation of character. Veterans with such discharges, although they may have served two, three, or more years in the military, also lose virtually all federal and state veterans' benefits including educational, health, and employment preference benefits.

Contrary to the popularly held belief that only those veterans who have committed serious crimes are given less than honorable discharges, many of the 280,395 less than honorable discharges the Department of Defense reports have been given in the past ten years were administrative discharges that often are based on unsubstantiated charges of misconduct ranging from bad-debt risks to drug abuse. This figure includes Undesirable, Bad Conduct and Dishonorable discharges. For the same period, there are 523,272 less than honorable discharges if "General" discharges are included. The American Bar Association Journal of September, 1971, in an article entitled "Due Process and Military Discharges", reports that:

At the present time, it is entirely possible for a young man of 18 years, with no prior record of involvement with school, juvenile or police authorities, to be discharged from the military, against his wishes, with an undesirable discharge under other than honorable conditions, based solely on the unsworn statement of a confessed drug pusher who is not present at the hearing. It might also be noted that the rule of law adhered to in most jurisdictions, (including the military), that a confession, absent direct independent evidence that an illegal act has occurred, is insufficient to sustain a conviction for a crime, has no application to administrative discharge proceedings as now constituted.

Most every program that purports to improve educational and vocational opportunities or delivery of health care for veterans neglects those veterans with 'less than honorable' discharges. According to the Washington State Department of Employment Security there are approximately 216,000 veterans in the Seattle metropolitan area and approximately 41,800 Vietnam veterans. The Veterans Administration estimates (on the basis of a 1% sample) that 3.59% are in the 'less than honorable' status which means that there are approximately 7,754 veterans in this area with 'less than honorable' discharges. Unfortunately, but predictably, there is a disproportionately high percentage of minority veterans in this stigmatized group. Clearly, to improve their chances of obtaining educationally, economically and emotionally rewarding positions in the society, the first step is to either change the status of their discharges to honorable or obtain changes in the legislation that systematically excludes this segment of the veteran population from obtaining veterans' benefits.

Seattle's Division of Veterans' Affairs under the Office of Human Resources joined forces with the Seattle-King County Economic Opportunity Board (local CAA) to develop a one-stop center for veterans known as the Seattle Veterans Action Center (SEA-VAC). Although the primary thrust of the program is oriented towards improving educational training opportunities for low income and minority Vietnam-era veterans, a wide range of services are offered.

The need for a legal component for the program became evident in the initial stages of development. Approximately 10% of the veterans contacted by SEA-VAC were found to have less than honorable discharges. On August, 1971, one outreach worker was assigned to investigate the availability of legal assistance for these veterans. After examining the service offered by the veteran service organizations such as the VFW, American Legion, and the DAV, it became clear the competent legal assistance would have to be developed independently. These organizations not only do not have legally trained personnel who can interview and assist the veteran in developing their petitions for change of their discharge status, but most Vietnam veterans are reluctant to approach the established veteran organizations who often show open contempt towards the less than honorably discharged veteran, and who would deny them membership based on the nature of their discharge.

In October, 1971 a recent law school graduate with a special interest and some experience in military law was hired for a period of three months to assist in developing a legal component. This component has structured its development with three major objectives in mind: 1.) to provide to individual veterans assistance in changing the status of their discharge; 2.) to assist individual veterans in appealing denial or reduction of VA benefits; and 3.) to research, analyze and make recommendations relating to both state and federal legislative changes necessary to reduce the inequities resulting from the administratively given undesirable discharges.

To date 81 veterans have been contacted who desire assistance in changing their discharge status. These cases are in all stages of development ranging

from the initial interviews to submission of their cases to the discharge review board.

On October 8, 1971 a recommendation for change of the City of Seattle civil service rules for veterans preference to include those veterans with undesirable discharges was proposed to the civil service department. That change was adopted as proposed and such veterans can now claim the veteran's preference when applying for City Civil Service positions.

The legal component is currently evaluating three bills introduced in the US Congress dealing with administrative discharge of members of the Armed Forces. One was sponsored by Congressman Charles F. Bennett, (D.Fla.). Another was introduced by Senator Sam J. Ervin, (D. N.C.), and the third by Senator Cranston (D. Calif.). The one of particular interest is S. 2108 introduced by Cranston which is remedial in that it would qualify veterans with undesirable or bad conduct discharges for VA medical care and after completing one year rehabilitative treatment for alcoholism or drug dependence would qualify the veteran for all VA benefits.

A particularly valuable expenditure of time has been spent in developing coordination with the Mayor's Committee to Aid Returning Veterans, the Veterans Administration, Legal Services Center, Public Defender and other private and public service organizations. For example, we have been able to coordinate and assist in preparing a suit challenging the denial of unemployment benefits for those veterans with less than honorable discharges.

Often, we have found that these men have been given "administrative discharges," discharges which are being used by commanding officers to circumvent the court-martial proceedings.

It has also come to our attention that there have been many instances of servicemen having their rights violated-rights which are spelled out in the Uniform Code of Military Justice. Sometimes, there have been discriminatory situations where constitutional rights are infringed upon and entitlements jeopardized, which require investigation and guidance by a party outside the military establishment. SEA-VAC has been very much concerned about upgrading military justice and has supported legislative and administrative remedies to avoid the abuses of "command influence" and the use of administrative discharges, we have become known for our concern and action orientation about the problems of discharges in the North West region.

More recently, it has come to our attention that many veterans have received Bad Conduct Discharges for drug usage and Undesirable Discharges for offenses connected with their drug usage. The drug users have most often come to drugs while in service, particularly when in Vietnam. Ironically, these discharges have barred these veterans from medical treatment either from the VA or the community due to a lack of drug-treatment centers. Furthermore, the drug-addicted veteran is disqualified from his veterans benefits and bears the cross of a less-than-honorable discharge which prejudices his employment possibilities and Federal unemployment rights. Those who need help most with their drug problems have not been able to get it.

The DOD, the Military Departments and the VA, finally recognized the seriousness of the problem. Amnesty programs, retroactive change of discharges, medical treatment regardless of discharge—have now been officially instituted.

Nevertheless the problem is far from solved. To seek a change of discharge, the veteran still has to go through the same long-drawn out procedures as before. Many do not know of this right and have not taken advantage of it. Still others are having difficulty getting the change despite official policy. Also, many veterans committed infractions in connection with drug usage which complicates their discharge problems. Much needs to be done in this area—with individual changes of discharge, with administrative remedies and with effective application of policy, and new legislation.

We are finding that the needs for advocacy are great, and would be even greater if veterans knew of their rights and the possibilities for change of discharge. SEA-VAC is preparing to expand and extend its Legal Assistance and to continue its activities in the Military Justice area to insure due process, eliminate abuses in discharge procedures, initiate court cases, and raise the quality of justice in the armed services. Further counseling to men and women when they are still in service can eliminate some of the discharge problems.

The question and subsequent changing of the discharge would be the first

step in a critical rehabilitation process. Now eligible for G.I. Bill and medical entitlements, with the stigma of a less than honorable discharge erased, the veterans have the chance opportunity of becoming contributors to their respective communities.

REFERENCE MATERIAL

"The Administrative Discharge: Military Justice?", Clifford A. Dougherty, Norman B. Lynch, *George Washington Law Review*, 33:418, December, 1964.

The article evaluates the then current administrative discharge process and the changes proposed by Senator Ervin in 1963. Discussed are command influence, right to counsel, confrontation of witnesses, review and appeal.

"Military Administrative Discharge Boards—The Right To Confrontation and Cross-Examination", Jerome A. Susskind, *Michigan State Bar Journal*, 44, January, 1965.

The author argues that confrontation and cross-examination of witnesses at administrative discharge board hearings is important if the individual rights are to be protected. *Harmon v. Brucker*, 35 US 579 (1958) and other cases applying due process in administrative board hearings are considered.

"Military Administration Discharges—The Pendulum Swings", Robinson O. Everett, *Duke Law Journal*, 1966:41, Winter, 1966.

The author writes on the various types of administrative discharges and the grounds for judicial review including failure of the military to follow its own regulations, command of influence, lack of fair hearings, and cruel and unusual punishment.

"Confrontation and Cross-Examination In Hearings For The Administrative Separation of Military Officers.", James T. Pandell, *Stanford Law Review*, January, 1968.

The constitutional and statutory sources for fairness in administrative discharge proceedings are discussed. The author disagrees with the decision in *Brown v. Gamage*, 377 F. 2d 154 (S.C. Cir. 1967), which held that the respondent's procedural rights were forfeited.

"Extraordinary Relief of Punitive and Administrative Discharges From the Armed Forces", Peter Vaira, *Duquesne Law Review*, 7:384, Spring, 1969.

The author comments on some of the judicial and administrative remedies available for seeking relief after receiving a less than honorable discharge: attack on the discharge proceeding itself, habeas corpus, petition to the Discharge Review Board and the Board for Correction of Military Records, back-pay suit in the U. S. Court of Claims, and a Writ of Error Coram Nobis to the Court of Military Appeals.

"The Administrative Discharge—Changes Needed?", Norman B. Lynch, *Maine Law Review* 22:141, 1970.

Congressman Barnett's and Senator Ervin's proposals for improving the administrative discharge procedure are presented.

"Disciplinary Discharges—Restricting the Commander's Discretion", Russell N. Fairbanks, *The Hastings Law Journal*, 22:291, January, 1971.

The author disagrees with Senator Ervin's plan to improve the administrative discharge procedure. He argues that the military should be able to discharge men it finds unsuitable or unfit, but only with the honorable discharge. The categories of general and undesirable discharge should be abolished.

"Judicial Determinations of Military Status", Daniel John Meader, *Yale Law Journal*, 72:1293, June, 1963.

The author discusses the availability of judicial review of military administrative proceedings including administrative discharges. This article is valuable but dated and has to be read with recent cases which tend to broaden jurisdiction of both Federal district courts and the Court of Claims.

"Due Process and Military Discharges", Douglas L. Castis, *American Bar Association Journal*, 57:875, September, 1971.

The administrative discharge system which allows the military to put a lifelong stigma of "other than honorable" service on a veteran is persuasively argued to be in violation of the due process of law guarantee of the United States Constitution.

"Judicial Review of Military Administrative Decisions", Major William K. Suter, U. S Army, *Houston Law Review*, 6:55, 1968.

This article evaluates existing legal theories pertaining to suits challenging military administrative decisions. The judicially evolving requirements of military administrative due process are also discussed.

STATEMENT OF JOSEPH L. VICITES, COMMANDER-IN-CHIEF, VETERANS OF FOREIGN
WARS OF THE UNITED STATES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: The subject which you and other members of your sub-committee have recently been weighing—that of “amnesty” to military deserters and draft dodgers—is of central concern to the more than 1,700,000 members of the Veterans of Foreign Wars of the United States.

In the brief statement that follows, I shall faithfully set forth the views of the V.F.W. on this painful and divisive matter.

Nearly one-third of the membership of the V.F.W. (more than 470,000 comrades) are veterans of our country's struggle in Vietnam. They, and the rest of us in the V.F.W., are keenly aware that more than 55,000 American servicemen have been killed carrying out our nation's commitment to that war-torn land and that thousands more have been wounded, many maimed for life. Additionally, the V.F.W., consecrated to honoring our dead by helping the living, knows full well that hundreds of American fighting men remain as prisoners in the camps of North Vietnam and the jungles of the South.

The massive fact of 55,000 dead Americans—killed in a war they neither chose nor shaped, but one from which they did not shrink—must dominate any consideration of this question from any quarter.

In short, the Veterans of Foreign Wars of the United States is *unalterably* opposed to any general amnesty for draft dodgers or deserters now, or for as far ahead as any one of us can now see.

Specific supporting rationale for the foregoing position follows:

(1) *Effect on Families of Servicemen KIA, MIA, and POW.*—It is difficult, if not impossible, to conceive of any but a handful of this tragedy-touched group being so confused in their perception of events as to urge a general amnesty. The overwhelming majority of this specially-affected group vehemently opposes any such step. (You will recall the witness before your Senate panel who movingly recalled President Kennedy's call “to bear any burden, pay any price, support any friend, and oppose any foe to assure the survival and the success of liberty.”)

(2) *Effect on the Active Military Forces.*—Beset as these forces are with seeking to assure disciplined, combat-ready forces in the current social environment, the harmful effect of “amnesty” to those who, self-serving and indulgent rationale apart, chose to stand aside rather than to fight would be, and I choose the word carefully, calamitous.

(3) *Effect on the Selective Service System.*—As Director Tarr of the Selective Service has testified, the effect of “amnesty” would be deeply hurtful to this beleaguered manpower mechanism. In short, why should any American appear for induction when those who preceded them evaded this manifest responsibility of citizenship without incurring any penalty.

(4) *Effect on Reserve Forces and the National Guard.*—These national assets are confronted with multiple problems in meeting their manpower goals in the blindly anti-military environment of today. A heedless “amnesty” would make their thankless job even tougher.

(5) *“Qualified Amnesty”—The Senator Taft Formula.*—Some variation of Senator Taft's approach may at some future point in time merit consideration—but not now. As both the president and the Secretary of Defense have indicated, when the U. S. casualty lists from Southeast Asia are over and we hear evidence from our POW/MIAs, the time may be more propitious for a policy review. *That time is not now.*

(6) *Views Attributed to Certain Draft Dodgers/Deserters.*—If I can believe the testimony of my eyes and ears, certain self-anointed “leaders” of groups in Canada, Sweden, and even in the U. S., have stated that “amnesty”—which implies forgiveness—is inappropriate for these people have done nothing for which forgiveness is appropriate in that, having been proven “right” by events, they have done nothing calling for forgiveness. The twisted logic of something called “premature morality” would apparently call for welcoming draft dodgers and deserters back home in a ticker tape parade down lower Broadway. This position and those who advocate it bring on something akin to physical nausea in me personally and in the membership of the V.F.W. These interminably vocal people don't want amnesty and we don't want to see them receive it. On this point we can all agree.

(7) *Deserters*.—This category has a mechanism in being to give them full consideration upon their apprehension or return to military control, i.e., the military courts martial system under the Uniform Code of Military Justice, as recently amended.

(8) *Draft Dodgers*.—A group that I believe is more culpable than many of the less advantaged military deserters and merits no favorable consideration.

To conclude, I am aware that the position set forth above may be considered by some to be predicably "hard-nosed" and not in step with "current realities."

I disagree with those who would so charge. The issue here is not the wisdom of having waged the war in Vietnam; the real gut question is do we countenance self-serving indulgence at best, or cowardice at worst. If we choose to do so, the days of this nation—"the last and best hope of mankind"—are numbered indeed.

STATEMENT OF VIETNAM VETERANS AGAINST THE WAR

Vietnam Veterans Against the War oppose the concept of amnesty for crimes evolving from the conflict in Indochina. Our organization is composed of over 25,000 veterans who have served in Indochina—two-thirds of whom enlisted voluntarily in the Armed Services. This response is partially in reply to those who question how do those who volunteered and went to Vietnam feel about those who fled the country rather than serve in Indochina. We oppose the concept of amnesty because amnesty implies forgiving and forgetting a crime. The crime is the war in Indochina, a consequence of that crime is the men who fled the country. We cannot as a nation forgive ourselves or forget our actions and the consequences of our involvement in Indochina.

We cannot allow ourselves to single out a small group to focus the responsibility away from those upon whom it falls. We as a nation are guilty of the violation of the principles and ideals for which this nation stands. Our government has violated the international laws that brought the leaders of Nazi Germany to trial at Nuremberg. It is as a nation and as a people that we should stand judgment before the ideals and principles of this nation was founded upon and to the people of Indochina.

The government has attempted to accuse the young of a crime when the government is guilty of the real crimes. If you are young, going to Vietnam is a war crime, refusing to go is a domestic crime, and just sitting still somewhere or somehow in exile or limbo is a moral crime. It is a terrible time today to be American and young and it is apparently a crime.

The real crime is the policies and the actions of our government that make our youth into criminals. It is inscribed over the Supreme Court of the United States, "Equal Justice under Law". We ask only for equal justice for all, that each crime be weighed in accordance with its severity, that each individual be held accountable for his actions or inactions, morally as well as legally, and that the United States rededicate itself to the principles and ideals that we have abandoned.

It is the Government of the United States that has committed the greatest crimes. It is they who would make the victims appear to be the criminal. It is they who are continuing the war. It is they who are prolonging the internment of the prisoners of war. It is they who are wounding, killing, and refugeeing thousands of Indochinese every week. It is they who have sent 55,000 men to their deaths for what we now know as a mistake. It is they who promised to end of the war and win the peace and now offer only years of suffering to the people of Indochina under the guises of Vietnamization and the rhetoric of winding down the war.

We accuse the Government of the United States of the following crimes:

1. Bombardment and artillery strikes against non-military targets, particularly undefended villages (Violation Hague Convention IV Art. 25)
2. Designation of Free-Fire Zones (artillery fire and bombardment within large land areas directed at anything that moves) (Violation Geneva Art. 3.1)
3. Battlefield policies which systematically deprive civilians of their dwellings and ancestral relics (burning them to the ground) (Violation Hague IV, 23 G, IV 46, Geneva 53)
4. Collective reprisals against whole villages for support or suspected support of guerrilla activities for isolated sniper-fire, mortar or rocket fire, emanating from the village (Violation Geneva 33)

5. The forcible transfer of refugees from their homes into camps (pacification, strategic hamlets) against their will (Violation Geneva Art. 49)

6. Reliance upon weapons that cause great suffering such as napalm, phosphorus, fragmentation, and 7½-ton daisy cutter bombs, 50 caliber and M-16 bullets, and nausea gas against human beings (Violation Hague Convention IV-22-E Hague 22)

7. Turning prisoners over to the Saigon Regime which engages regularly in acts of mistreatment, torture and execution (Violation Geneva Art. 12)

8. Search and Destroy Operations which result in the killing of unarmed civilians; men, women and children (Violation Geneva Art. 3.1) (The Army prosecuted William Calley for this kind of operation.)

9. The use of highly toxic defoliants causing death to young children, old people and animals, producing birth defects, permanent damage to soil, destroying crops, producing famine and plague—ecocide (Violation—U.N. General Assembly voted to ban 80-3).

10. Training and indoctrination at military camps in preparation to engage in unlawful later actions (Violation Geneva 3.1)

In lieu of these acts we must recognize who are the criminals and who are the victims. The draft evaders, the deserters, the soldiers who fought and died, the prisoners who remain, the people of Indochina and of America are the victims. The men who caused and pursued the war for their own political gains or profits are the criminals and their acts should never be forgiven or forgotten.

STATEMENT OF HERBERT M. HOUSTON, DIRECTOR, NATIONAL LEGISLATIVE SERVICE,
VETERANS OF WORLD WAR I OF THE U.S.A., INC.

Mr. Chairman and members of this distinguished committee: It is a pleasure to have the privilege of representing our National Commander, Mr. J. B. Koch, of the Veterans of World War I, of the U. S. A., Inc., on the question of granting amnesty to certain citizens now outside the boundaries of the United States of America.

The Veterans of World War I of the U. S. A., are an organization representing the Veterans of the First World War exclusively, chartered by Congress. Of the original Veterans of the First World War numbering nearly five million; one million three hundred thousand remain. There were quite a sizeable group of these veterans who served in the uniform services during World War II, and some served during the Korean War.

This span of life has enabled these veterans to experience a larger percentage of the development of these United States than any previous generation of her citizens. They have watched with curiosity the goldfish eaters, the telephone booth contests, the flag pole watchers, and many radical modes of dress. None of these fads brought more than a few laughs to the Veterans of the War of 1917-1918. They were the ones who faced a new experience for themselves and for America.

In Europe, nation after nation was being ground into the earth by the war which began in 1914. Belgium, Holland, and Luxemburg lay prostrate. Britain and France were bled white under the onslaught of the greatest war machine known to the world at that time.

Had it not been for America with her young army of fresh troops, the Prussian forces of the German-Austro-Hungarian Empires would have crushed Europe in 1918, and the whole world would be entirely different today. With Europe conquered, the forces of the Axis powers might well have crossed the Atlantic and crushed American before she could have mobilized an army and built a war machine capable of driving them off.

These veterans of this war that stood before an enemy and brought her to defeat before she could conquer the world have had many shocking experiences during their lifetime; yet, none quite as shocking as the one facing America today, that of the decay of the moral fiber of so many of our citizens.

The question under consideration at this hearing, as we understand it, Mr. Chairman, is what attitude shall we, as a Nation, take toward a few of our citizens who have renounced our Country, defied her law's and undermined an influence among other nations of the world.

Actually, they comprise a very small percentage of our population, less than 1%; however, their deeds have been magnified all out of proportion. The trag-

edy appears to us is that we have let the movement grow so as if it were no more than a group of incorrigible boys. When the facts of life see that it is a group of termites eating the foundation from under our national structure. The same formula is being used as has been used in many other countries which have fallen and ceased to exist.

In considering the group in question, about which amnesty is being discussed, we find a number of categories:

- (1) There are the deserters from our uniformed services.
- (2) There are those who defy the laws of the land and leave their Country to avoid service in the uniform service of our Country.
- (3) There are those whose philosophy of life is not in sympathy with the American System of Government.

First, we wish to call to your attention those who have deserted the uniform service to avoid hazardous duty. This group comprises those who have sworn to uphold and defend the Constitution of the United States of America, and by their cowardice have renounced their oath. They have, of their own volition, abandoned their homes, their nation and all its precepts. To grant amnesty to these would be prejudicial to all who have served this nation in war and in peace. It would be like making Benedict Arnold a hero. They have betrayed the confidence invested in them by their comrades in uniform, their families and friends at home, their nation and their personal honor.

They were taught from their childhood that fire would burn, yet they, of their own choice, walked into the fire of betrayal, and the Veterans of World War I are against the Congress giving them a magic carpet to extirpate their burns.

The second category of those involved are those disillusioned individuals who somehow have allowed themselves to believe that two wrongs make a right. I am speaking about those who have assumed the role of Judge, Jury and the Supreme Court in determining what is right and what is wrong.

They either failed to understand the principles upon which this Nation was founded, or have been persuaded by another of alien philosophy to rebel against constituted authority as proclaimed by the Constitution of these United States of America.

Their argument appears to be that they feel that certain laws are unjust and are therefore wrong. What they fail to understand is that if they believe in America, provision is made by law to bring about modification of law by regulated procedure. Also, that they may be protected by law until such law is changed by abiding by the rules. For them to take the attitude of an autocrat removes them from the American concept of a citizen, and disallows them the opportunity to bring about the changes they proclaim to be wrong.

Provision is made by law for conscientious objectors in war if the scruples of the individual are recorded. Whereas no provision is made in America or any other country for cowardice.

The Veterans of World War I feel that to grant amnesty to these draft dodgers would be the betrayal of all veterans who have fought to preserve this Nation from its enemies from Gettysburg to the conflict in Viet Nam.

To grant amnesty to those who have chosen to evade service to their Country would make a mockery of the service and sacrifices of all those loyal, law abiding, brave young men and women who today wear the uniform of our Country, in Germany, Korea, Viet Nam, and other places of the world where we have commitments. Moreover, the violations of the law in this regard is conducive to a general disregard for law.

Our government is a government of the people, by the people. A government based upon law. Without this we would have one of two conditions-dictatorship or anarchy.

We, as a Nation, do not believe in dictatorship. Whether it be like Russia, China, Cuba, or any of the other communistic police governments of today, or like that of Hitler's Germany.

Our corrective institutions continue to stay full of those who chose to violate the law. Our organization does not believe in granting amnesty to those who willingly disobey the law, especially if their disobedience is against our National Honor and the Constitution of the United States of America.

The third category we should like to address our thinking to, is that small but loud group who are the sponsors of the youth of our land who burn draft cards, mutilate the Flag of our Country, leave the Country to evade military

service, or desert from the uniformed services. Some of them are college teachers, some are members of the clergy, some are political leaders; they are a mixture of various cultures, and classes. They do have one thing in common, they are against the Government of the United States of America, and seek devious means to undermine it's foundation through various methods. Many of them openly declare that they are communists and seek the overthrow of the Government, others seek to hide the label of their activity in the belief they can do greater damage under cover than they can openly. Of the three groups, the last is the most treacherous and the Veterans of World War I do not approve of their philosophy of life, and government, and are against amnesty to the victims of their followers.

Thank you, Mr. Chairman.

STATEMENT OF WORLD JUSTICE AND PEACE OFFICE, PROVINCE OF ST. JOSEPH OF THE
CAPUCHIN-FRANCISCAN ORDER

One hundred and twenty-seven of the four hundred Capuchin-Franciscan brothers from the Province of St. Joseph (Indiana, Michigan, Minnesota, Montana and Wisconsin) submitted a petition today seeking amnesty for conscientious objectors to war and to military conscription.

The petition was addressed to "the President, Aspirants to the Presidency, Congressmen, Citizens and the young men whose lives have been dominated by the Indochina war, in the confidence that they, wherever they are, are already concerned with the making of a better America."

It called on the President "to grant", in an act of statesmanship, "an immediate and general amnesty to those who have been forced to leave the country or who have been imprisoned because of their opposition to compulsory military conscription." It further sought "amnesty on an individual basis to those who deserted the armed forces for reasons of conscience when no other serious crime was involved."

The Capuchin petition was made within the same Christian framework as were similar pronouncements by the Presbyterian and Methodist churches, the Church of Christ, the Committee of Southern Churchmen, and the National Council of Catholic Bishops.

The Bishops' statement of October 21, 1971 criticized present draft laws that did not allow for elective conscientious objection and called upon "moralists, lawyers and civil servants to work cooperatively toward a policy which can reconcile the demands of the moral and civic order concerning the issue."

In reference to this point the Capuchin petition goes beyond the Bishops' statement. Considering the moral obligation that one must follow the dictates of his conscience in any conflict between civil and moral law, the Capuchin petition states that it finds no guilt in men that act out of sincere objections of conscience. It clearly rejects the idea of "further punishment".

The Province of St. Joseph is the middle west province of the Capuchin-Franciscan order of Catholic priests and brothers. The order's founder was a pacifist who commanded his lay followers to refuse to take up arms during the civil strife of the period. The order still stresses its dedication to peace and reconciliation. Last September it opened its Provincial Office of World Justice and Peace in Milwaukee to sensitize its members to such issues. Those who signed the petition make up part of that office's communication network.

Although the office recognized the difficulties and complexities that go with the issue of amnesty, they clarified that amnesty means 'a forgetting' and not 'a forgiveness'. They rejected the idea of alternative service as the substitution of one punishment for another and not aimed at bringing about true reconciliation.

STATEMENT OF JERRY NORTON, PUBLICATIONS DIRECTOR, YOUNG AMERICANS
FOR FREEDOM

Young Americans for Freedom, with 60,000 members in 600 high school, college and community chapters, is the nation's largest conservative youth organization. Its membership includes many Vietnam era veterans.

I serve Young Americans for Freedom as its National Publications Director. I am also a veteran. I was on active duty with the United States Army in the

enlisted ranks from December of 1968 until September of 1970. That service included one year in Vietnam, with artillery and information units of the First Air Cavalry Division. During that Vietnam service I was wounded.

While YAF has not taken an official position on amnesty for deserters and draft dodgers, I believe that this statement reflects the sentiments of most of our members. We would not favor amnesty.

The reasons for our position are several. First and most important, to permit amnesty is to set a precedent that says, "If you think a law is immoral, break it, because you may very well find that society changes its mind, forgives you and does not punish you." More simply it says, "You were completely right to disobey the law."

As conservatives, we in YAF believe in individual freedom, yet we are also aware that the concept of government becomes meaningless if individuals are free to pick and choose those laws they will obey and those they will disobey. While those who have decided that the Vietnam war is totally immoral and indefensible may brush this argument aside, I suggest they ask themselves if they would so readily forgive a white racist who follows his conscience and blows up a black church, or on a more mundane level, excuse those whose consciences told them a given government program was immoral and therefore refused to pay the taxes to support it (in which case I as a conservative would be paying very few taxes indeed). To permit this is to permit government of whim, not law.

What I am suggesting then, is not that amnesty is right or wrong depending on whether the Vietnam war is right or wrong, but that it is wrong because it makes a mockery of the concept of law and government. It is one thing to disobey a law because one feels it immoral—I can conceive of circumstances in which I would do just that—but it is quite another to expect the society that made the law not to punish one for that disobedience. Martin Luther King expected to go to jail when he violated the law; his concept of civil disobedience was not that of those who request amnesty, nor could it be if we are to have a society of order rather than anarchy.

Second, one must consider the effect of amnesty on the more than two million men who obeyed the law and served in Vietnam. I believe that all but a very vocal and very small minority of these men felt that in America, with its free speech and democratic system, there were ways to correct bad laws and bad policies without breaking the law, and that both duty and honor compelled them to serve if called. Amnesty would indicate to them—or those who survived, anyway—that they need not have risked their lives, that there was nothing dishonorable about deserting or evading the draft, they they should feel free to ignore the policies of their country. In addition to its effect on them, what kind of precedent would amnesty set for those future generations that might be called upon for similar sacrifices.

Third, and I inject this into the discussion only because those advocating amnesty seem to think it a major consideration, there remain many in this country who do not consider the war immoral or indefensible, and I think this includes many who would like to see the U.S. withdraw from Vietnam post-haste. One can reach that conclusion—the conclusion that Vietnam is not worth the sacrifices of blood and treasure—and still believe that our motives there were moral: that the South Vietnamese would be better off if the Communists lost than if they won; that America has not made atrocities a policy, while the other side frequently has; that our position in the world will be weakened, as John Kennedy was aware, by Communist domination of Indochina. In sum, to say that most Americans now believe that Vietnam was a mistake is not to say that they accept the reasons offered by deserters and draft dodgers as to why it was a mistake, or want those deserters and draft evaders to be forgiven.

In conclusion, for a variety of reasons, but primarily because for a democratic government to be viable its citizens cannot pick and choose what laws they will obey and what laws they will ignore, most of us in Young Americans for Freedom oppose amnesty.

Appendices

1. SELECTIVE SERVICE SYSTEM RESPONSES TO QUESTIONS FROM SUBCOMMITTEE

QUESTIONS SUBMITTED BY SUBCOMMITTEE FOR DR. CURTIS TARR,
SELECTIVE SERVICE SYSTEM

(1) Section 3 of the Administrative Procedures Act requires publication in the Federal Register of "rules of procedure" and those having "general applicability" to provide proper notice to the public. Your Administrative Bulletin 765.1 describes the Registrants Processing Manual as having "general applicability and legal effect." Therefore, do you intend to publish it in the Federal Register?

(2) Those portions of the Registrants Processing Manual which have the effect of regulations are to be pre-published according to the letter of Mr. Erickson. In your testimony, you agreed that those portions which have the effect of regulation but are not labeled as such in the Registrants Processing Manual would be pre-published. Which sections of the Registrants Processing Manual do you intend to pre-publish?

(3) In your testimony, you note that certain information pamphlets concerning the Selective Service System are now printed in Spanish. Could you indicate why forms have not been printed in Spanish for distribution in those districts where a substantial portion of the population is Spanish-surname?

(4) The Inspection Services Bulletins are described in Administrative Bulletin 765.1 as bulletins containing "informative items and messages of general interest." Could you submit those reports which have been so far to the Subcommittee? Do you plan to have them available for public inspection?

(5) In the publication of final rules, the criticisms of the Subcommittee Chairman and others of the provisions restricting the time period for personal appearances and appeals to 15 days were not heeded. Could you explain why the objections were not viewed as sufficient justification to retain the previous 30-day period? Also, could you indicate whether the new rule of discretion for extending the time period includes the traditional cause of "lack of understanding the right to appeal"?

(6) In your new regulation 1625.2, you provide in subsection (4) for the board to order a reopening "upon the written request of the registrant that is accompanied by written information presenting facts not considered when the registrant was classified or which, in the opinion of the board, justify a change in the registrant's classification." Do you interpret the words "in the opinion of the board" to be the same as the words "if true," an interpretation which seems to be required by the Mulloy decision?

(7) Do you intend to provide ultimate appeal to the Director of Selective Service on all placement decisions of conscientious objectors into alternate service positions? Would this not be the minimum requirement under the language of the conference report? Is it not particularly to be provided where there is a question of unsatisfactory work performance and a state director is given the authority to recommend a case for prosecution?

(8) In your testimony, you note that Form 150 was prepublished but not because you considered it a regulation. Yet, were not all forms considered as regulations under Selective Service regulations extending back to 1948? In fact, under form Regulation 1606.51, forms were explicitly made part of the regulations. When you revoked that regulation on January 12, 1972, isn't that an example of what Mr. Erickson referred to when he wrote "Obviously, Congress should not be deemed to have contemplated, in amending Section 13(b)

so as to provide for the pre-publication of the System's regulations, that material essentially the same as that previously issued as a regulation could henceforth be issued without pre-publication by the simple device of labelling it something other than a regulation?"

(9) Mr. Tarr, in your testimony before the House Armed Services Committee July 23, 1970, you stated: "We have stoutly resisted the idea that a young man should be represented by his own lawyer in appearing before the local board.

"If we become involved in a local board in adversary proceedings, we will get entwined in a kind of legal framework with which our local board organization cannot cope.

"And so stoutly resisting this, we are anxious to offer the services of appeal agents whenever we can, and where-ever they are justified ----" That argument was understood during the debate last year as a reason why the provision adopted by the Senate for legal representation was not adopted by the Conference. Yet, one of your actions since passage of the new law was to abolish government appeal agents. Can you explain the change from your position before the House Armed Services Committee? Since you have been unable to provide a sufficient number of advisors to registrants, do you believe that some discretion might be given local boards to permit them to enable a registrant to bring a legal advisor to the personal appearance?

(10) Your letter of February 9, 1972, (which is attached) to all State Directors appears to instruct registrants to give up their rights of appeal in exchange for being placed in a lower priority selection group. Could you indicate the provision in the law which authorizes this practice? Also, since the letter indicates that most registrants are appealing from denial of their conscientious objector classification, aren't you tempting them to disavow their moral beliefs in exchange for being placed in less liability of being drafted?

(11) Has the accompanying "Recommended Letter to Registrants" been sent to all persons with requests for a personal appearance and an appeal? How many requests and appeals were then on file? How many requested being placed in the Second Priority Selection Group? How many were so placed? Were any registrants who wrote local boards and advised them of their desire to withdraw their request for a personal appearance or appeal *not* placed in the Second Priority Selection Group?

(12) The Conference Report on the 1971 extension and revision of the draft law was published on July 30, 1971, with the only remaining matter of debate being the "Mansfield Amendment," which was not related to Selective Service in any way. However, Selective Service did not pre-publish any regulations to implement the new law before November 3, 1971. Consequently, the first changes to be made effective appeared on December 10, 1971, and a large part of the regulations governing classification and appeal procedures of the Selective Service System have been frozen for a period of nearly eight months (since July 1, 1971) stalling the processing of thousands of claims, and placing these thousands into Extended Priority. What necessitated this inordinate delay in the implementation of regulations, especially in view of the fact that during this eight-month period a call of only 10,000 men was placed upon the System?

(13) Apparently because of the delay in the promulgation of regulations, Selective Service has decided to allow most registrants retained in Extended Priority as a result to escape the draft on March 27 and April 1 of this year by entering the Second Priority Selection Group. However, conscientious objectors in class 1-O, whose processing for alternate service was delayed due to this same circumstance remain eligible for the draft and are being ordered to work at a time when no one in Class 1-A or 1-A-O is being inducted. 1-A-O's and 1-A's who were not inducted in 1971 because they were exercising lawful rights of appeal are now being placed in lower priority, while their 1-O counterparts who exercised their rights are being drafted into alternate service. Is this policy not punitive to 1-O conscientious objectors, and does it not violate Section 6(j) of the draft law which provides that CO's be ordered to perform work only "in lieu of induction"?

(14) The Selective Service Act as amended in 1971 provides that the Director of Selective Service, rather than the local board, shall determine what is appropriate work for conscientious objectors, and shall be responsible for finding such civilian work. The Conference Report (Joint Explanatory Statement)

explains that this change was desirable because the Director was best able to determine national needs, and could utilize conscientious objectors in the best interest of the nation. However, the regulations subsequently implemented, delegate this responsibility to the State directors, and with one exception, do not provide for a review of the decisions made by the State directors. A conscientious objector may request a review of the State director's denial of his job proposal which he makes in the first 60 days of his processing. However, after the man is on the job, he is subject to the supervision of the State director. Any decision made by this State director to transfer the registrant to another job, to refuse to transfer him, to grant him early release on bona fide grounds, or to report him for prosecution for "failing to comply with reasonable requirements of an employer," is not reviewable by the National Director. Even if such a review is allowed (as it must be by the terms of the law), registrants are not given notice of this right by the regulations. Only a well-counseled registrant would know that he could request such a review. Do you intend to change Part 1660 of the regulations to provide for this review of State directors' decisions, or will registrants be informed that they have this right of review by other means?

(15) Part 1660.6(a), which outlines criteria for appropriate work for conscientious objectors, allows the State director to waive the requirement that the 1-W registrant receive compensation reasonably parallel to that received had he gone into the armed forces. This provision would allow a man to be assigned to a job at subsistence or lower pay which is far below that received by servicemen in the armed forces under the new pay scale. What guarantee is there that State directors do not assign men to low-paying jobs which do not allow them to meet their financial responsibilities or to support their dependents?

(16) Why are conscientious objectors eligible for Class 1-O not allowed to volunteer for civilian work if they are deferred or in Class 1-H, while registrants who wish to volunteer for induction may do so at any time, regardless of their classification? Is it not discriminatory to deny the CO the privilege of fulfilling the obligation which the law imposes at the time of his choosing, while the non-CO is granted this privilege?

(17) The Supreme Court has ruled in the case of *Mulloy* that a local board must reopen the classification of a registrant when he presents new facts, not before considered by the board, which, if true, would justify a change in classification. However, in the proposed regulation 1625.2(d), the local board is required to reopen only if "in the opinion of the board" the facts justify a change in classification. Does not this proposed regulation directly violate the requirement of *Mulloy* that there must be no determination on the merits of the evidence presented unless there has been a reopening of the registrant's classification?

(18) The new law and the regulations which have since been effected nullify many of the old procedural directives such as Local Board Memoranda and Letters to All State Directors. However, many of these directives have not yet been rescinded, and continue to be followed by many local boards. For example, LBM's 64, 98, and 111, to mention only a few, are in violation either of the law or the new regulations, yet they continue on the books. What prevents their immediate rescission?

(19) What guarantee is there for registrants who, for valid reasons, are unable to appeal their classification within the 15 days allowed by the proposed regulations that they will not receive an order to report for induction after the 15 days and thereby lose their right to appeal? Take for example a registrant who is overseas. If the local board does not receive his request for an appeal within 15 days, they are free to issue him an induction order if his RSN has been reached. If they later receive his request for an appeal, must they cancel the induction order so that he is not denied his appeal rights because of the 15-day limit?

(20) The regulations allow local boards and the Presidential Appeal Board to limit personal appearances to 15 minutes. The State Appeal Boards do not have any minimum time limit which they must allow a man for an appearance. The new draft law, however, affords registrants the right to present a reasonable number of witnesses on their behalf before the local board, and the new regulations, as proposed, determine this number to be three. If a regis-

trant uses his right to present three witnesses on his behalf, is it reasonable to limit the total time for his personal appearance to 15 minutes? If, for example, each witness were to speak for only three minutes, this would leave only 6 minutes for the registrant to present his own case to the local board and respond to questions from board members. Would it not be more reasonable to grant registrants a right to a longer period of time for their appearance before the local board, so that they can effectively exercise their right to present witnesses? Why are registrants afforded no right to a minimum time for appearances with the State Appeal Boards?

(21) Dr. Tarr, you testified that Section 613.1, subsection 7, of the Registrants Processing Manual was not intended to prevent a young man from taking Form 100 out of the Local Board Office to discuss with family or counsel prior to signing it. We understand that at least one state (see attached letter) is clearly interpreting it to mean that. Have you changed the RPM provision and have you asked your field inspection service to investigate the matter to confirm that improper procedures have been corrected?

[Attachment to Questions for Dr. Tarr]

IDENTICAL LETTER SENT TO ALL STATE DIRECTORS

FEBRUARY 9, 1972.

Mr. FELIX R. PETREY,
State Director,
Selective Service System,
Montgomery, Ala.

DEAR MR. PETREY: Many state directors have expressed concern about the application of paragraph 5(b) in our Letter to All State Directors (00-53) dated January 11, 1972. In that letter, we provided for a uniform method of placing all registrants who are in Extended Priority Subgroup A into the Second Priority Selection Group at the expiration of a 270-day period beginning July 1, 1971. The pertinent sentence in that paragraph reads: "For registrants in Subgroup A, any of that time which is prior to July 1, 1971, and the time from July 1, 1971, until the date the revised Parts 1624 and 1626 of the Selective Service Regulations will become effective, shall count toward the 270 days of consecutive availability."

The intent of paragraph 5(b) was that all people who are in Subgroup A, regardless of when they became available for call, should receive credit for the 270-day period beginning July 1, 1971. Those who became available before July first began to accumulate credit on the date of availability. This intent has been misunderstood, and part of the purpose of this letter is to clarify that intention.

We now must face another problem. Which relates to those members of Subgroup A in the Extended Priority Selection Group who still are on delays owing to personal appearances and pending appeals. If they were aware of this procedure, and we could make it possible for them to give up their rights for personal appearances or appeals, they could take advantage of the 270-day period and their liability in Extended Priority would terminate late in March.

I know that many state directors feel that those men who have delayed induction in every way possible and have attempted to frustrate both the system and some of us, should be required to serve. I recognize that it disturbs some of our people when it becomes possible for this type of person to avoid service. But on the other hand, the Department of Defense probably will ask for us to induct very few people in the months ahead. The Army would rather work with younger men who have a willingness to serve. Furthermore, Selective Service would be much better off to deal with young men and to permit some of those recalcitrant persons to become eligible for classification into Second Priority.

Accordingly, we have decided that we should contact all men in Extended Priority Subgroup A to notify them that they may withdraw their requests for personal appearances and appeals, and thereby enter the Second Priority Selection Group at the end of the 270-day period beginning July 1, 1971. Attached is a letter which I recommend that you send to all registrants in Extended Priority Subgroup A who currently have personal appearances and appeals

pending. Obviously these letters must be mailed promptly in view of the time element.

I solicit your cooperation in this matter. I am convinced that if we handle this matter in the way I have suggested, we in Selective Service, the Army, and the nation as a whole will be better served.

Sincerely,

(Signed) CURTIS W. TARR.

Attachment.

RECOMMENDED LETTER TO REGISTRANTS

A review of your selective service file indicates that you are currently in the Extended Priority Selection Group, Subgroup A, and that you have pending a request for a personal appearance and/or an appeal.

Due to circumstances beyond your control, your request for such personal appearance or appeal could not be expeditiously handled, and therefore it is recommended that you give serious consideration to writing your local board and advising them that you desire to withdraw such request for a personal appearance or appeal.

We feel that this action will be in your best interests, because you will be placed in the Second Priority Selection Group, which is a lower group, on March 26, 1972, thereby making you less vulnerable for induction into the armed forces. Such a letter should be received by your local board not later than March 20, 1972.

*Inquiries with regard to the policy on prime exposure to induction or alternate service should be addressed to _____, the State Director, at _____

(address)

*NOTE.—Recommend the statement to this effect in order that explanations on the basis of policy can be provided from the State Director's office. Inasmuch as so many of the records will be in appeal board files as opposed to local board files, if a proper address for inquiry is not reflected in the letter undue confusion in correspondence is likely to exist at the local board level.

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM,
Washington, D.C., May 19, 1972.

HON. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN, In your letter of April 11, 1972, you asked that we provide answers to a list of questions for use in the record of the hearings recently held. The answers appear below in seriatim.

(1) Yes, but not as a "regulation."

(2) Apparently there has been a misunderstanding. There has never been an intention to pre-publish portions of the RPM. Since it is not intended that the RPM contain sections which are in effect "regulations" which have not been pre-published as "regulations," what is requested would be unnecessary.

(3) It has not been determined feasible to print forms in Spanish. The major effort is to assure that forms are correctly completed by having employees who can speak the problem language placed in local boards where there exists a language problem, specifically in New York, Connecticut, Florida and California. Since questionnaires will be mailed only to the few men who have low random sequence numbers, the registrant who cannot speak or understand English would be interviewed and assisted in filling out his forms by local board personnel when he is required to complete the form.

(4) The Inspection Services Bulletins were discontinued following the December 1971 issue. A total of 15 monthly issues were printed and distributed to the state headquarters. These bulletins were an operationally oriented, internal publication primarily designed to assist Selective Service personnel in keeping abreast of activities within the System. They were discontinued when the National Headquarters Inspection Services Division were disbanded after the states' inspection programs had been in effect for nine months and were

able to meet the responsibility for the inspection function. Since the bulletins were in the form of an "in-house" newsletter, they were generally not made available to the public. A representative copy of the bulletin, issued in June 1971 is attached for your perusal.

(3) We received no convincing argument that a registrant requires more than fifteen days to decide whether he wants to appear before his local board or take an appeal to the appeal board. If he makes either request he is assured a minimum of fifteen days to prepare for his personal appearance or appeal. Thus the total time between action by his local board and the day of his personal appearance before the local board or consideration of his appeal by the appeal board will never be less than thirty days. In the absence of special circumstances, it is difficult to foresee that the "lack of understanding of the right to appeal" would be "some cause beyond (the registrant's) control."

(6) The quotation in this question is now out of date. A revision of section 1625.2(a) has been published. The new language should make clear its intended meaning which is:

"The local board will reopen and consider anew the classification of a registrant (1) upon the written request of the Director of Selective Service or the State Director of Selective Service and upon receipt of such request shall immediately cancel any order to report for induction or alternate service which may have been issued to the registrant; (2) who is in Class 1-H and becomes subject to processing for induction according to these regulations and the rules prescribed by the Director; (3) in any classification for the purpose of classifying him in Class 1-H according to these regulations and the rules prescribed by the Director; (4) upon the written request of the registrant that is accompanied by written information presenting facts not considered when the registrant was classified which, if true in the opinion of the board, would justify a change in the registrant's classification; or (5) upon its own motion if such action is based upon facts not considered when the registrant was classified which, in the opinion of the board, would justify a change in the registrant's classification: *Provided*, that in the event of (4) or (5) the classification of a registrant shall not be reopened after the local board has mailed to such registrant an order for induction or alternate service or, in the event the order to report for induction or alternate service was postponed and a subsequent letter from the local board establishes the date for induction or for reporting for alternate service, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In order that there be no misunderstanding or misinterpretation of the above, section 625.2 of the RPM comprehensively instructs the local boards in the actions that are required of them. A copy of section 625.2 is attached for your information.

(7) Regulations now provide for a review by the Director only where the registrant submits a job and the job is not approved by the state director. Where there is a question of unsatisfactory work performance or when the registrant was relieved for cause or left his job unjustifiably, section 1660.9(a), and (c) of the regulations provides for protection of the registrant's interests. The state director is required to conduct a full investigation of the matter and secure a statement from the employer describing the circumstances. The state director is required to provide the registrant with this statement and to secure a statement from the registrant if he wishes to make one. If the state director's investigation reveals that the registrant's termination was through no fault of his own, the state director assigns him to a new job as quickly as possible.

Before the state director can refer any case for prosecution the case must be reviewed and approved for such referral by a representative of the General Counsel's office who is a representative of the Director.

In our opinion we are following the language of the conference reports which implies the Senate conferees accepted the position of the House urging that the Director "draw heavily on the experience of local boards and state directors" in assigning conscientious objectors.

(8) Revoked section 1606.51 of the regulations incorporated by reference all forms into the regulations. This in itself did not thereby make a form a regulation. Accordingly, Mr. Erickson's admonition has no application. However,

for fear that it be argued that the contents of all forms, if considered to be regulations, had the force and effect of law, it was the General Counsel's opinion that the consequences of such an interpretation would be unwarranted and not desired, since Congress had seen fit by Public Law 89-52 to provide criminal sanctions only for the destruction and mutilation of registration and classification cards and not for the destruction and mutilation of all forms.

(9) The position of government appeal agent was abolished because of repeated allegations, including those from the American Bar Association, that a conflict of interest existed in requiring that the appeal agent serve both the registrant and local board. This same allegation had been made in the subcommittee's hearings of 1969 by the American Civil Liberties Union. Although the System still needs more advisors to registrants, it is believed that through the efforts of the Young Lawyers Section of the American Bar Association and the strenuous recruitment efforts of state directors, the availability of these advisors will soon be adequate. A transient situation in the transition to a new arrangement is an unwise basis for adopting any version of the adversary scheme which the Congress has repeatedly rejected.

(10) The letter of February 9, 1972, and its attachment, "Recommended letter to Registrants" did not purport to instruct registrants but rather to advise them as to the possible exercise of a favorable option which they might wish to employ. The Military Selective Service Act provides in section 10(b)(1) thereof that the President may prescribe rules and regulations to implement the Act. Under the additional authority of Executive Order Number 11623, dated October 12, 1971, the Director has prescribed certain rules and procedures which are deemed to be necessary, though temporary, guidelines setting our priority selection groups and the circumstances under which registrants may be removed from one such group and assigned to another. The procedural directives which were in effect at the time of the writing of the February 9, 1972, letter are cited as Local Board Memorandum Number 99, as amended November 3, 1971, (now rescinded), Letter to All State Directors (OO-53), dated January 11, 1972, and Temporary Instruction 632-1 of the Registrants Processing Manual. Both the Temporary Instruction and the Letter to All State Directors were predicated upon the provision in Local Board Memorandum No. 99 to the effect that in order for members of Subgroup A of the Extended Priority Selection Group to remain in that group they must have been "fully available" and not in a delay status resulting from the pendency of a personal appearance or appeal request. It is further noted that the right of a registrant to withdraw an appeal request made by him prior to the time any classification appellate action has been taken is implicit in any construction of the regulations, inasmuch as any such request for appeal is a voluntary act on the part of the registrant and no prohibition as to its withdrawal is found in the regulations.

We do not feel that in permitting registrants who sought the classification of 1-O, or any other classification on appeal, that we were by this procedure "tempting" them to foreswear any deeply held personal beliefs. Rather it is our position simply that such a registrant should be furnished the opportunity legally available to him under law, regulations and procedural directives to make a free and intelligent choice as to the exercise of his appellate remedies in the light of the consequences to him in terms of requirements against him to perform service in the armed forces or in alternate civilian work. To fail to inform registrants of their legal options in these respects might, we feel, be construed as the prejudicial withholding of essential criteria and information to him. A subsequent instruction (Temporary Instruction 632-3, Registrants Processing Manual) made it clear that such registrants, regardless of the pendency of an appeal or request for personal appearance would go into the Second Priority Selection Group. Temporary Instruction No. 632-3 was not issued until after the rescission of Local Board Memorandum Number 99 referred to above.

(11) Although the states transmitted the "Recommended Letter to Registrants," and we could obtain the numbers involved by requesting the information from each state, the remaining pertinent four parts of the question cannot be answered unless we solicit every local board to review each file of the specific registrants involved which would require several weeks time and involve many man-hours.

(12) There was no inordinate delay in the promulgation of regulations after the enactment of Public Law 92-129. The Act became effective September 28, 1971. On October 12, 1971, Executive Order Number 11623 was signed by the President. This order delegated authority to the Director to issue regulations which previously had been promulgated by executive order. By the terms of the order, the Director was directed to circulate proposed regulations to designated executive agencies for a period of ten working days prior to publication in the Federal Register for public comment. The first proposed regulations were submitted to executive agencies for comment on October 13, 1971. The ten working days expired on October 27, 1971. The regulations were then published in the Federal Register for public comment on November 3, 1971. Thereafter pursuant to the requirements of section 13(b) of the Military Selective Service Act, the 30-day mandatory period ran in which comments were received. Upon completion of this period, the comments were then evaluated. On December 9, most, but not all of the November 3 proposed regulations were promulgated. Those that were not were extensively studied and reworked prior to being republished for public comment on January 12, 1972.

(13) The answer to both questions is no. No Class 1-O registrant whose alternate service processing was begun after 1-As with the same RSN were issued induction notices has been issued an Order to Report for Civilian Work.

On the contrary, the processing of every Class 1-O registrant who is being or has been processed to alternate service was begun while draft calls were in effect.

Selective Service has traditionally taken the position that the processing of 1-O registrants and 1-A registrants is inherently different. The processing of a Class 1-A registrant for induction into the Armed Forces begins when he is issued an order to report for induction. He then reports to an Armed Forces Entrance and Examining Station where he is sworn into the military and further processed toward his ultimate military assignment. A Class 1-O registrant's processing differs greatly. Processing of Class 1-O registrants traditionally began when they were issued a former Selective Service Form 152. These 1-O registrants then entered into a sometimes lengthy processing period, ultimately leading to their placement in an alternate service job. This period of processing allowed Class 1-O registrants the opportunity to locate their own jobs.

If a registrant's local board failed to approve the registrant's proposed job, he was entitled to have his state director arbitrate the question. Thus, whereas the processing of a Class 1-A registrant toward his military assignment is virtually automatic and confined to well-defined procedures and time periods, the processing of Class 1-O registrants toward their civilian work assignments has often taken varying lengths of time, and takes place prior to the issuance of work order. Because of this inherent difference in processing, many 1-A registrants with the same random sequence number had already been assigned to active duty with the military. If there was any prejudice in their processing, it was to their benefit for they have had the opportunity to locate their own job assignments. The inductee is given no such opportunity.

As the foregoing suggest, we must respectfully disagree with the contention that 1-A and 1-A-O registrants have been placed in lower priority, while their 1-O counterparts who exercised their rights are being drafted into alternate service. The counterpart of the 1-O registrant being processed for alternate service is the 1-A who has already been inducted, not the 1-A who is appealing his classification or otherwise postponing the issuance of an induction order.

These comments describe the present policy of the Selective Service System in regard to processing Class 1-O registrants. This policy is being challenged in several court actions now in progress. We are prepared to comply should the courts find our interpretation of the law incorrect.

(14) The Director is empowered to delegate responsibility. In the regulations he has delegated to the several state directors the responsibility for the detailed supervision of the alternate service program in each state. It is normal and proper for the head of an organization to delegate authority and responsibility to subordinate echelons. State directors, because of their knowledge of local conditions and the opportunity to make on-the-spot approvals or investigations, are better able to serve the interest of registrants than the Director in National Headquarters. There is no evidence of arbitrary reassign-

ment on the part of state directors and transfers are few in number. Most of these are initiated by the registrant. In our view of the law we do not find where it is provided that the Director reviews actions such as this, but obviously he can review any action of his subordinates.

The Director is providing state directors with guidance in what is deemed appropriate work for conscientious objectors as suggested in the Conference Report. He is alerting state directors of national needs and work that is in the national health, safety and interest. To assist in carrying out this new program, a surveillance program has been initiated.

(15) The Director does not attempt to set the standards for compensation. The policy is that 1-W registrants should receive the same pay and benefits as other employees doing similar work who are not conscientious objectors. Experience has indicated that the authority to waive the element of compensation has worked to the advantage of registrants. There are a number of 1-W registrants who as members of various organizations work for subsistence plus a small stipend. The Director has never taken the position that registrants have to be assigned to low-paying jobs nor will he allow the state directors to do so. Many 1-W registrants today are assigned to jobs which pay them much more than their inducted colleagues.

(16) This question is based upon an erroneous assumption. A registrant is never "eligible" for Class 1-O in the sense stated. When the registrant establishes his entitlement to classification in Class 1-O he would then be classified in such class by the local board (or state appeal board or Presidential Appeal Board). The restriction of the opportunity to volunteer for alternate service to registrants who have been classified in Class 1-O is consistent with the opportunity of registrants to volunteer for induction. As noted in the question a registrant in Class 1-O may volunteer at any time.

(17) The *Mulloy* case did not have the effect of making section 1625.2(a)(1) of the regulations illegal. It merely interpreted the existing regulation as requiring the reopening of a classification where a prima facie case for a new classification has been presented. The local board still must determine whether the registrant has presented facts not considered previously. In addition, the *Mulloy* case dealt specifically with a claim for a 1-O classification. It does not necessarily have application to all types of deferments. Therefore, section 1625.2(a), where it states "if true, in the opinion of the board," is not mandated by *Mulloy* even should it be argued that the change of language is a change of intent rather than in fact a clarification of intent.

(18) We have no information that supports the charge that local board memoranda are being followed after regulations in conflict with them have been issued. The objective has been to make available to local boards timely instructions consistent with applicable regulations. It is believed that a more orderly transition to the use of the Registrants Processing Manual could be achieved if many of the local board memoranda could be rescinded at the same time. All remaining local board memoranda which have not already been rescinded will be rescinded in the next few days as the remaining sections of the RPM are promulgated.

(19) When a registrant fails to appeal his classification within fifteen days and the local board determines that he had a valid reason for his failure to appeal, the local board will then consider his appeal. If the local board does not accept his reason, the registrant may request the Director or state director to intercede in his behalf. There is no guarantee that he will not be issued an induction order immediately after the lapse of the fifteen days, but if he is, the thirty day delay in induction period will extend time to rectify an error, if an error has been made. If he is issued an induction order immediately after the expiration of the fifteen days his local board would extend the right (section 1626.3(b)) to reopen his classification if his delay in requesting an appeal is reasonable.

(20) Local boards and the Presidential Appeal Board have authority to extend the time beyond fifteen minutes for the registrant to make his personal appearance to ensure that he has a full opportunity to make a fair claim. We have no reason to assume that such boards will act arbitrarily or unfairly. Registrants are entitled to such time for their personal appearance before the appeal board as is reasonably necessary for the fair presentation of their claims. The appellate procedure suggests that greater flexibility will be required for personal appearances before appeal boards than the local board. The National

(Presidential) Board requested the rule applicable to the length of personal appearance before it.

(21) The revision of Chapter 613 of the Registrants Processing Manual along the lines indicated in Dr. Tarr's testimony has been distributed to local boards. The revised procedures will be followed.

Sincerely,

SAMUEL R. SHAW,
Legislation and Liaison Officer
(For the Acting Director).

Attachments.

Attachment No. 1

[From the Inspection Services Bulletin Volume I, No. 8, June 1971]

There have been some questions raised concerning whether items in the Inspection Services Bulletin are to be considered as official statements of policy. This Bulletin is designed to be informative only and will not be used as a vehicle for transmitting new policy or changes in current policy. Oftentimes items will appear which will explain, clarify, or in some instances broaden the scope of the policy being discussed within the limits of the policy itself. It also contains, as reminders only, references to recent publications. Additionally, state directors have the opportunity to demonstrate how a particular problem was solved in their state. These items are taken either from the inspectors' report or your letters to the Director. Other items of general interest are included.

It is hoped that this Bulletin will continue to serve you. You have permission to reproduce it in whole or in part as you see fit.

DANIEL J. CRONIN,
Assistant Deputy Director, Operations.

FROM THE OPERATIONS DIVISION * * *

SPECIAL CALL FOR OPTOMETRISTS

We have received word from the Department of Defense that it terminated Special Call No. 45 for Optometrists on April 30, 1971, since sufficient numbers of registrants have been appointed or scheduled for appointment to meet the needs of the Army, Navy and Air Force.

CIVILIAN WORK IN LIEU OF INDUCTION

A review of cover sheets, sent to National Headquarters for approval of the issuance of a work order by the Director, as required by section 1660.20(d) of the regulations, reveals that more than twenty-five percent must be returned for correction of procedural errors. This results in a time consuming delay in the processing of these cases.

It is requested that each state headquarters carefully screen each case for procedural errors before forwarding it to this headquarters.

MEMBERS FOR STATE MEDICAL ADVISORY COMMITTEES

During a recent meeting with the Association of Professors of Medicine, Mr. Cronin, Assistant Deputy Director for Operations, was advised of their members' availability to serve on state medical advisory committees.

State directors are asked to consider members of this organization for placement on the committees. Deans of the medical colleges should be contacted for information and names of personnel who may be appointed to existing, or future, vacancies.

PEACE CORPS VOLUNTEERS

The termination date of June 1, 1971, for the program of postponements for Peace Corps volunteers, set out in paragraphs 4 and 19 of Local Board Memorandum No. 105, has been moved forward to July 1, 1971. Under this extension, the Director will postpone the induction of qualifying registrants accepted for Peace Corps training before June 30, 1971.

Ref: Local Board Memorandum No. 105, as amended, dated 24 May 1971.

CONSCIENTIOUS OBJECTOR CLAIMS AFTER INDUCTION ORDER

Claims for Class I-O or I-AO classifications can not be considered after the Order to Report for Induction (SSS Form 252) has been issued.

Such claims must then be submitted to the service after the actual induction of the registrant.

Ref: Local Board Memorandum No. 111, dated 23 April 1971.

RECRUITER'S REVIEW OF EXAMINATION RECORDS

A recruiter of a regular or reserve component of the armed forces (including the National Guard) may review a potential enlistee's examination records.

He must, however, present *written authority*, dated and signed by the registrant!

Ref: Paragraph 3, Local Board Memorandum No. 93, as amended, dated 18 February 1971.

LOCAL BOARD MEMORANDUM NO. 99 (AMENDED)

The advanced copy of Local Board Memorandum No. 99, provides the amended material for paragraph 3 of Section IV.

The change reads as follows:

"... Board actions with respect to information submitted by or at the request of the registrant or with respect to a registrant's request under paragraph 5 of LBM No. 117, will be effective as of December 31, in the year in which submitted..."

DEFERMENT OF MEDICAL PERSONNEL

Physicians and allied medical specialists who are subject to the up-coming doctor's draft may be considered for deferments based upon the concept of community essentiality.

A doctor may be considered essential in the community only if he is directly involved in patient care and his removal from the community would result in an extreme shortage of an essentially critical community service where a replacement cannot be found by the community involved in the time allotted by a postponement of induction.

Ref: Letter To All State Directors (OO-23), as amended, dated 20 May 1971.

TRANSFERS FOR INDUCTION

Executive Order No. 11586 amended Selective Service Regulations to repeal the portions providing for transfers for induction.

Under the provisions of LBM No. 116, which sets forth all the procedural details, the registrant who is distant from his local board may, in lieu of reporting at the time and place specified in the Order to Report for Induction (SSS Form 252) or a letter order (if applicable) present himself, with the order to report for induction, to the nearest AFEES and voluntarily submit to induction processing.

He may no longer have his induction transferred to another local board!

No changes in the transfer procedures for preinduction physical examinations have been made.

INSPECTION SERVICES DIVISION * * *

INSPECTION OF AFEES FACILITIES

The USAREC inspectors use two forms, during their inspections at the AFEES facilities, to evaluate the "meal contract" and "lodging contract" establishments.

Copies of these forms may be obtained from National Headquarters upon request.

FICTITIOUS SSS FORM 109'S

In Oregon selective service personnel have received some SSS Form 109's from college and university registrars which obviously bear erroneous selective service numbers. The state headquarters has contacted the schools and in-

formed them that names of men with these selective service numbers are not the names of Oregon registrants. As yet they have received no replies. The matter will be discussed with the U.S. Attorney.

RECRUITING ACTIVITIES

In the Far West inspectors noted that recruiters were enlisting registrants for two years after the order to report for induction had been issued.

Also, recruiters have been enlisting registrants in the delayed entry program without notifying the local boards.

Prompt steps were, of course, taken to halt these practices.

THE EXCHANGE CORNER * * *

One method of encouraging attendance of local board members at meetings has been utilized by the *State Director of South Carolina*.

A monthly attendance record is compiled from the SSS Form 112. If a member misses three consecutive local board meetings, he receives a letter from the state director encouraging his attendance at meetings!

An unusual procedure, which has the concurrence of the *State Director of Colorado*, involves immediate contact by the FBI of each registrant who fails to report for induction. The U.S. Attorney feels this action encourages compliance with the law. This action is actually taken ahead of the formal report on SSS Form 301 and has materially reduced losses from failure to report.

The *State Director of Maine* has appointed some 323 registrars! Most town clerks within the state have been appointed registrars because of the widely scattered small communities. There is also a registrar at the state prison and the Maritime Academy.

The *State Director of Georgia* has continued to operate a very comprehensive public information program. In addition to talks before civic groups and veterans organizations during the period September 1969 to June 1970, visits and talks were made to approximately 400 high schools.

The busiest period is January to May when the state director and the public information officer will devote 30-40% of their time to high school visitations.

A report from the *State Director of Michigan* reveals that:

"... State headquarters' excellent liaison with the AFEES in Detroit has resulted in the development of new procedures for maintaining better control over papers of registrants while at the AFEES.

"Monthly reports are forwarded to the AFEES listing those registrants whose records are 30 days or more overdue after examination at the AFEES. A new 'reports control section' at AFEES reviews this list of registrants with delayed papers, searches its files to locate the papers or to find the reason for the delay, and subsequently reports to the state headquarters on the status of the papers of each registrant listed. While the problem is not yet resolved, it would appear that it has been properly identified, and through the cooperation of state headquarters and AFEES it is hoped that this problem will be greatly reduced, if not completely eliminated.

One further report is presented here on how the "failure-to-register" problem is being met. Other results of the recent survey will appear in a later edition of the Bulletin.

An interesting and effective technique is used by the *State Director of Minnesota*. He reports as follows:

"In the Fall of 1970 this headquarters randomly selected yearbooks from four metropolitan high schools located in the St. Paul-Minneapolis area for the 1969 graduating class. The name of each male senior was checked against our locator card file to determine whether or not he was registered. By the use of the telephone directory, or any other directory, an attempt was made to locate the address, and a letter was sent to the student reminding him of his duty to register.

"Of the 1,082 male draft age seniors checked, seventeen letters of inquiry were mailed to those who had not registered with Selective Service in the State of Minnesota. The response to these letters revealed that nine had already enlisted in the military service, the remainder were returned as undeliverable."

More next month!

WHAT THE INSPECTION REPORTS REVEAL * * *

General inspection reports were released on another seven (7) states during the month of March 1971. Included were:

Georgia	Oregon
Idaho	South Carolina
Maine	Tennessee
New Hampshire	

All of these state systems, with the exception of Maine, were inspected for the second time.

Reported herein are pertinent findings of the inspectors within the area of operations.

INTRODUCTION

(1) Only one state of the seven registered a *shortfall* for the year 1970. It is one of nineteen states in the System which had their 1970 "Percent of Calls Filled" figure fall below the 100% goal.

(2) The actual shortfall was 113 men—giving the state a figure of 73.4% for "Percent of Calls Filled (1.6% of the total shortfall of 7,009 in the nineteen states).

REGISTRATION

(1) No major problems were found in this area by the inspectors.

(2) Minor problems included: (1) a lack of sufficient registrars to adequately cover the state area, and (2) extra work created thru the carelessness or inexperience of registrars.

(3) The only "failure-to-register" incidents involved Canadian immigrants. These were quickly resolved to the satisfaction of all parties.

(4) Two refusals to register were experienced in one state but fast action resulted in legal convictions.

CLASSIFICATION

(1) No real classification log-jams exist in any of these states. Most were reported as reasonably current in these actions.

(2) Most local boards in these states were meeting at least once monthly, to insure prompt action on all necessary classification actions. Only a few scattered boards failed in this, but succeeded in making up the lost ground.

(3) All but one state headquarters had up-to-date information about the number of local board meetings, the attendance records of board members (local and appeal), and the workloads of each board. These data are kept current through the use of "control-systems" at the headquarters, as well as by staff visits. A new system was installed in this one state immediately following its inspection.

(4) Student classifications, as well as other deferments, were monitored reasonably well to insure that the holders thereof did not remain classified beyond regulation limits or beyond the period when reason for the classification ceased to exist.

Student reclassification actions were prompt, particularly during November and December. The backlog of such cases which existed in one state has now been cleared.

(5) From the random sampling of boards it appeared that no improper III-A classifications were allowed after the loss of a II-S, except for two hardship cases. Several of these states use welfare records, personal appearances, SSS Form 118 (Dependency Questionnaire), or other means to insure the truth of the hardship claims.

(6) Local boards in one state were slow to reduce unnecessary deferments.

(7) The year-end policies were efficiently and promptly complied with.

(8) Personal appearances before boards, while time consuming, posed no real problems. They were handled by one, two or even all members without undue taxing of the membership. In one state, four of every ten registrants so scheduled resulted in no-shows.

(9) In one state, requests were being made by school management personnel for the deferment of all teachers, with agreement by the local boards. This problem was resolved at the appeal board level by providing local boards with

up-to-date material on essentiality from the State Department of Education or by the state directors appealing either to the appeal board or the Presidential Appeal Board in those cases in which he believed the facts did not support a determination of irreplaceability.

CONSCIENTIOUS OBJECTORS

(1) Generally, the conscientious objectors still pose problems in the states, primarily because of the added workload factors involved in processing claims.

(2) Suitable placement continues to be a problem for operations except in two southern states.

(3) The actual determination of the validity of the claim continues to be a serious matter. Also, the preparation of the "basis-in-Fact" evidence for the cover sheet is of considerable concern to the boards.

APPEALS

(1) No appreciable backlog of appeal cases was reported.

PHYSICAL EXAMINATIONS

(1) All seven states reported their relationships with AFES as "satisfactory" or better.

(2) All were holding the examinations of registrants with RSN's of 150 or below, plus those in categories which might warrant induction, including extended priority selection group.

RANDOM SEQUENCE LOTTERY SYSTEM PROCEDURES

(1) No problems of any magnitude were reported.

CALLS

(1) Relevant statistical material here was reported in the introduction.

(2) Control systems reflecting performance of each local board in filling calls were in operation at five headquarters. Immediate planning for such a system was done in the other two states.

INDUCTIONS

(1) No major problems were reported.

ENLISTMENTS

(1) Each state headquarters has continuing concern in this area of operations, since registrants' enlistments have material impact on their operations.

(2) Registrants in these geographical areas continue to enlist after the preinduction physical examination and after the order to report for induction has been issued. These acts continue to affect the efficiency of the state operation since they change the planning and force additional processing of other men to enable the boards to meet their call. Often the boards fail, due in part to the no-show who may well have enlisted without their knowledge, thereby creating a gap in the induction ranks. In the shortfall state, it was found that 35 to 40 percent of the total ordered for induction enlisted after the order was issued. In other states in this group, the figures varied between 16 and 20.5 percent.

(3) The cooperation of recruiters is generally good, in that they follow the ground rules, and the board is informed promptly of the registrant's entry into service. Certain "end-runs" have been noted, but generally are stopped promptly when the state lodges a complaint. Two such instances appear in the "Enlistment" section of WHAT THE INSPECTION REPORTS REVEAL."

AUDITS

(1) None of this group has maintained a full, periodic audit of all local board operations. Each relies on the services of a few to sample or spot-check board activities.

(2) Several have plans to upgrade this facet of their operations immediately.

FROM THE MAIL BAG * * *

1. Local Board Memorandum No. 93, as amended, dated 18 February 1971, re: Furnishing Information to Regular and Reserve Components for Enlistment Purposes.
2. The Selective Service Newspaper (April 1971).
3. Letter To All State Directors (AP-19), dated 5 April 1971, re: Administrative Bulletin No. 2.101.
4. Letter Orders No. 1-71, dated 7 April 1971, re: Assignments.
5. Letter To All State Directors (Unnumbered), dated 7 April 1971, re: Manpower Utilization (AP-12).
6. Administrative Bulletin No. 2.18, as amended, dated 8 April 1971, re: Classification of General Schedule (GS) Positions.
7. (Advance Copy) Local Board Memorandum No. 116, as amended, dated 9 April 1971, re: Induction of Registrants Distant From Their Own Local Board.
8. Letter To All State Directors (OO-21), dated 12 April 1971, re: Special Call No. 46—Dentists.
9. Letter To All State Directors (OO-22), dated 12 April 1971, re: Reserve Appointments For Doctors, et al.
10. SSS News release No. 71-8, dated 12 April 1971.
11. Administrative Bulletin No. 2.77, dated 15 April 1971, re: Rotation of Assignment.
12. Letter To All State Directors (OP-3), dated 16 April 1971, re: Collocation.
13. Letter Orders No. 2-71, dated 16 April 1971, re: Assignments.
14. Letter To All State Directors (AA-15), dated 16 April 1971, re: Sales of Excess Typewriters.
15. (Advance Copy) Local Board Memorandum No. 111, as amended, dated 23 April 1971, re: Reopening of Registrant's Classification.
16. Letter To All State Directors (AA-16), dated 23 April 1971, re: Administrative Control of Long Distance Telephone Calls.
17. Letter To All State Directors (OO-23), dated 26 April 1971, re: Advice of National Security Council, et al.
18. (Advance Copy) Local Board Memorandum No. 99, as amended, dated 27 April 1971, re: Procedures to Implement Random Selection Lottery System.
19. Letter To All State Directors and Regional Service Centers (AP-25), dated 29 April 1971, re: Civil Service Retirement.
20. Memorandum To All State Directors, dated 30 April 1971, re: Conscientious Objector Claims After the Order To Report for Induction.
21. SSS News Release No. 71-9, dated 3 May 1971.
22. Letter To All State Directors and Regional Service Centers (AP-24), dated 3 May 1971, re: Executive Secretaries—Personnel Actions.
23. Memorandum To All State Directors (GC-3), dated 6 May 1971, re: Organization of the Office of the General Counsel.
24. SSS News Release No. 71-10, dated 6 May 1971.

SPECIAL REQUEST ! ! !

The present printing and mailing plans call for the distribution of three copies of this bulletin to each state headquarters. However, in recent weeks several state directors have written, requesting additional copies.

Our request to state directors—please write in and tell us:

(1) To whom in your state would you like to give copies of the Inspection Services Bulletin?

(2) How many copies of the Inspection Services Bulletin would you need to meet this distribution request?

(3) (a) Do you presently reproduce this bulletin for further distribution?

(b) Do you circulate extracts from this bulletin?

(4) Do you issue a version of your own for state-wide distribution?

Thank you for your cooperation in this matter.

Attachment 2

SECTION 625.2.—REOPENING OF CLASSIFICATION

The local board shall reopen and consider anew the classification of a registrant:

(1) upon the written request of the Director of Selective Service or the State Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction, Selection for Alternate Service, or Order to Report for Alternate Service which may have been issued to the registrant;

(2) who is in Class 1-H and becomes subject to processing for induction;

(3) in any classification for the purpose of classifying him in Class 1-H when he becomes eligible for that classification;

(4) upon its own motion if such action is based upon facts not considered when the registrant was classified which, in the opinion of the board, would justify a change in the registrant's classification; or

(5) upon the written request of the registrant that is accompanied by written information presenting facts not considered when the registrant was classified which, if true in the opinion of the board, would justify a change in the registrant's classification. For purposes of reopening, the local board will consider the facts presented by the registrant to be true unless there is evidence in the registrant's file to the contrary, or the registrant's claim is plainly unbelievable. A registrant who makes false statements to his local board is subject to criminal penalties.

Provided, That in the event of (4) or (5) the classification of a registrant shall not be reopened after the local board has mailed to such registrant an order for induction or alternate service or in the event the order to report for induction or alternate service was postponed and a subsequent letter from the local board establishes the date for induction or for reporting for alternative service, unless the local board, in its judgment, first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

SECTION 625.3.—REFUSAL TO REOPEN AND CONSIDER ANEW REGISTRANT'S CLASSIFICATION

1. When a registrant files with the local board a written request for reclassification and the local board is of the opinion that the information accompanying the request fails to present any facts not considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that the new facts, if true, would not justify a change in his classification, it shall not reopen the classification.

2. In any case where the local board refuses to reopen, it shall (1) place in the registrant's file a written statement of the reasons for its decision not to reopen his classification, and (2) advise the registrant by letter of its decision and the reasons therefor.

SECTION 625.4.—CLASSIFICATION CONSIDERED ANEW WHEN REOPENED

When the local board reopens the registrant's classification,

2. DEFENSE DEPARTMENT RESPONSES TO QUESTIONS FROM SUBCOMMITTEE

ASSISTANT SECRETARY OF DEFENSE,
Washington, D.C., April 26, 1972.

HON. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: This is in response to your letter of April 11, 1972, requesting supplemental information on military absentees as it relates to the recent hearings on draft procedures and administrative possibilities for amnesty.

Enclosed are the responses to the 16 questions referenced in your letter. Discharge statistics for 1941-1945 (Question 11) are not maintained by this office; however, the Military Departments have been requested to provide such data. Upon receipt of their responses, we will immediately furnish this information to your office.

I trust the above information will be of assistance to you. Your interest in matters pertaining to Armed Forces personnel is appreciated.

Sincerely,

LEO E. BENADE,

Major General, U.S.A.,

Deputy Assistant Secretary of Defense.

Enclosure.

RESPONSES TO QUESTIONS

Question No. 1.—During the testimony, you used the figure 2,313 to indicate the number of deserters in foreign countries. Yet it could well be possible that a substantial number of the more than 27,500 others you state have deserted could also be in foreign countries? You cannot say with any assurance whether those 27,500 are in the United States or not in the United States, is that not correct?

Answer.—The Military Service through their Deserter Information Points (DIPs) submit a report to the Assistant Secretary of Defense (Manpower and Reserve Affairs) on each military absentee who goes to (or attempts to go to) a foreign country. A format of the report is enclosed as Attachment A. These reports are submitted as soon as it is ascertained that the absentee has gone or has attempted to go to a foreign country. The DIPs receive their information on these absentees from a variety of sources, such as: (1) the Federal Bureau of Investigation, (2) the Department of State, (3) friends (civilian and military) and family of the absentee, (4) commanding officer of the absentee, (5) foreign and United States news media, (6) letters from the absentee to the President, Senators, Congressmen and the Office of the Secretary of Defense, (7) Military Investigate agencies, and (8) civil (foreign and United States) law enforcement authorities.

Experience indicates that such absentees are very vocal and often acknowledge their presence in a foreign country and their alleged reason(s) for their absence. In addition, unless the absentee is financially solvent, he must obtain a job soon after he arrives in the foreign country. In most foreign countries, this involves the procurement of a "government work permit" for aliens which requires an application for landed immigrant status. This information is furnished to the DIPs by one or more of the aforementioned sources.

Any appraisal of the accuracy of DoD's system of reporting and accounting for military absentees must consider the following factors:

(1) The Military Services are large organizations involving 2.6 million men and women, assigned throughout the world.

(2) Every day, a number of service members are transferred from one unit to another, both within and without the United States.

(3) Every day a number of service members go absent without leave (AWOL) or desert, or return from an AWOL or deserter status. Thus, there is continuous change in the AWOL/deserter population.

(4) In any personnel-accounting system involving human determinations and record-keeping, the possibility of human error always exists.

However, despite these complexities, we believe that our AWOL and deserter information, particularly as to those in foreign countries, is reasonably accurate and as free from error as is possible.

Question No. 2.—Also, the deserter profile and the estimated causes of desertion, they are derived from a study of the 600 or so individuals who have been returned to military control, is that not correct? Have you attempted to discover the deserter profile and the suspected causes of desertion of those individuals who are still at large?

Answer.—The typical absentee-deserter profile and causes for desertion which were discussed during the hearings were not derived solely from an analysis of 600 absentees returned to military control.

The profile and the identification of causes for absenteeism were based on an analysis of relevant data on all individuals who absented themselves without

authority during fiscal year 1971 and on those who went AWOL prior to fiscal year 1971 and were still absent at the end of fiscal year 1971. The annual report reflecting the causes for absenteeism/desertion and typical absentee/deserter profiles (Reports Control Symbol: DD-M(A)1039), as prescribed by Section VII A 2, Department of Defense Directive 1325.2, "Desertion and Unauthorized Absenteeism," served as the basic source for this information.

Question No. 3.—You indicate, General, in the Summary of Administrative Discharges Issued under DOD Directive 1332.14 that a total of 73,000 have been issued by the various services. Has any effort been made to determine whether opposition to the war in Vietnam was a factor in determining whether an individual received an honorable, general or undesirable discharge?

Answer.—The conditions warranting administrative separations are reflected in Attachment B. "Opposition to the war in Vietnam" is not a reason for administrative separation.

If an individual's opposition to the war in Vietnam results in specific actions warranting administrative separation for either unsuitability, unfitness, or misconduct, his separation will be recommended based on a specific condition. The character of the discharge certificate issued to the individual, i.e., Honorable, General (under honorable conditions), or Undesirable (under other than honorable conditions), will be determined solely by the individual's military record during that enlistment or period of service covered by the discharge. This includes the individual's behavior and performance of duty; it does not include his personal opinion regarding the war in Vietnam.

If the question implies the possibility that the discharge authority or board of officers involved, or both, may consider information about the individual not a part of the record, it would be impossible to inquire into the minds of the individuals involved to identify the reasons for their decisions.

Question No. 4.—Is it possible that opposition to the war in Vietnam produced actions which then resulted in general or undesirable discharges for individuals who otherwise had acceptable military records?

Answer.—As indicated in question 3 above, it is possible that an individual's "opposition to the war in Vietnam" could result in specific actions that warranted his administrative separation. It is emphasized that the individual's entire record of military service for the period covered by the discharge, including his behavior and performance of duty, is considered in determining whether he should be discharged, and if so, the character of his discharge certificate.

Question No. 5.—How many individuals filed conscientious objector claims between 1966 and the present? How many were granted? How many individuals who filed conscientious objector claims were given honorable, general or dishonorable discharges prior to their normal completion of service date?

Answer.—Attachment C reflects the status of in-service conscientious objector applications for discharge (class 1-0) and non-combatant service (class 1-0-A) for calendar year 1965 through calendar year 1971.

In regard to a further break-out of conscientious objector-oriented discharge information, statistics are not maintained which identify individuals who filed conscientious objector claims and were issued either an honorable, general, undesirable, bad conduct or dishonorable discharge prior to the completion of obligated service. The identification of such individuals would require a manual review of all records of servicemen discharged during a specified time frame. For example, during the last three and a half years, 3.5 million enlisted personnel have been discharged from the military services. Included in this total are approximately 7,000 conscientious objector claimants who remained in service after a determination was made on their conscientious objector application (1-A-0 approvals and disapprovals and 1-0 disapprovals). Therefore, these 7,000 individuals would have to be initially identified with an additional case-by-case analysis to determine if the individual was discharged prior to his expiration of term of service. This would be a very time-consuming and diffi-

cult task. As a general statement, those discharged for conscientious objection (1-0 approvals) undoubtedly were discharged prior to their expiration of term of service.

Question No. 6.—If discharges in absentia are given, how are the individuals notified?

Answer.—Where an absentee is beyond military control by reason of a continuous prolonged unauthorized absence and it is determined that he be recommended for discharge in absentia under other than honorable conditions, the absentee is advised in writing and by registered mail (see Section VIII, paragraph D 4, Department of Defense Directive 1332.14, "Administrative Discharges").

This notification is sent to the absentee's current home of record or current address, or to the current address of his next of kin as reflected in the member's service record, as appropriate.

Question No. 7.—Under Department of Defense Directive 1332.14, VII D4 (a) (2), it states: "A member beyond military control by reason of unauthorized absence may be issued an undesirable discharge in absentia only under the following circumstances (one of which is) when the Secretary of the Military Department concerned determines that the issuance of such discharge would serve the national interests." Whether used or not, doesn't that provide the authority for discharges to be given to deserters without requiring them to return to military control?

Answer.—We believe your Department of Defense Directive reference should have been Section VIII D 4 a (2).

Basically, Section VIII D 4 provides the authority for discharges in absentia to be issued to deserters without requiring them to return to military control. However, as a result of the 1968 Armed Services Subcommittee Hearings on the problem of deserters in the Armed Forces, the Committee recommended that discharges in absentia be discontinued in the case of deserters (see Attachment D). As a result, Department of Defense policies and procedures concerning the issuance of discharges in absentia were revised to place narrower limits on the authority to issue such discharges. Accordingly, the current provisions of Section VIII D 4 are being used with great discretion as these discharges in absentia statistics indicate (see our response to question 8).

Question No. 8.—How many times have honorable, general or dishonorable discharges been given in absentia since 1965? For what reasons were they given?

Answer.—Since July 1, 1966, only 17 discharges in absentia have been issued to deserters residing in foreign countries. All were undesirable discharges and were issued to deserters who were aliens and who had returned to their countries of origin.

The discharges were based on the criteria outlined in Section VIII D 4, Department of Defense Directive 1332.14.

Question No. 9.—How do you explain the statement under Section V: "Policy (2)" no member shall be discharged except that, if appropriate, an undesirable discharge may be issued without board action if the member is beyond military control by reason of prolonged unauthorized absence." Does that indicate again, the possibility for discharge while an individual is in Canada?

Answer.—Section V reflects general policy statements regarding the individual's rights in administrative discharge proceedings. Section V A 2 addresses those situations where an undesirable discharge may be issued without administrative board action. One of the situations is when a member is beyond military control by reason of prolonged unauthorized absence. Section VIII D 4 reflects the pertinent criteria for determining the issuance of a discharge in absentia. The two sections are compatible.

Question No. 10.—Under 1325.2 identified causes of absenteeism and desertions and descriptions or profiles of the typical absentee or deserter, etc., are to be sent 90 days after the end of each fiscal year to ASD(M&RA). Could you furnish us with the past five years reports required under 1325.2, Section VII?

Answer.—Department of Defense Directive 1325.2, "Desertion and Unauthorized Absenteeism" was issued on August 24, 1970, with an effective date of December 24, 1970. The annual fiscal year report prescribed by the Directive which included causes of absenteeism/desertion and descriptions or profiles of the typical absentee/deserter was not required prior to the issuance of the Directive in August 1970. Therefore, such reports are not available for FYs prior to FY 1971. As indicated in our response to question 2, the fiscal year 1971 reports received from the Military Departments served as the basis for the development of causes for absenteeism and for the typical absentee profile. A copy of the typical absentee/deserter profile chart is enclosed (Attachment E).

Question No. 11.—Could you provide us with the number and percentage of dishonorable, general and honorable discharges, by service, issued during the years 1941–1945, 1951–1954, and 1965–1971?

Answer.—Attachment F reflects discharges (Honorable, General, Undesirable, Bad Conduct, Dishonorable) issued for fiscal years 1950–1971. In regard to 1941–1945 discharge statistics, we have requested the Military Departments to ascertain if such information is available and, if so, to submit the data to this office. Upon receipt of their responses, we will immediately furnish this information to your office.

Question No. 12.—Since there have been such a large number of general and dishonorable discharges in recent years and those discharges have such an important effect on an individual's future ability to obtain employment, do you think that something could be done to provide for an after-the-fact review by a civilian or joint civilian-military board to permit young men to demonstrate that since leaving the service their civilian record justifies abolishing the general or dishonorable discharge record?

Answer.—Based on the nature of the proposal in this question, we believe that "discharges issued under other than honorable conditions" would be a more accurate term than "general and dishonorable discharges." A general discharge is issued under honorable conditions. Discharges issued under other than honorable conditions include: (1) Undesirable, (2) Bad Conduct, and (3) Dishonorable.

Each Secretary of a Military Department is authorized to make changes in the type of discharge, acting through his Discharge Review Board or Board for the Correction of Military Records. The Discharge Review Board consists of five officers designated by the Secretary of the Military Department (Title 10, United States Code, Section 1553) and considers cases where applicants allege that their discharges were issued erroneously or in violation of law, regulations or policies.

The Board for Correction of Military Records consists of civilian appointed by the Secretary of the Military Department (Title 10, United States Code, Section 1552) and may correct records to change a discharge, upon a showing of error or injustice involved in its issuance.

If an individual believes that he has ground for a review of his discharge, he may apply to either Board or to both concurrently. The only exception to this general statement is that dishonorable discharges may only be reviewed by the Board for the Correction of Military Records. Since the discharge characterizes the quality of service during the period of military duty, subsequent conduct of civilian life, standing alone, provides no basis for changing the military discharge. However, it is one factor considered by the Boards in arriving at their determinations.

Public Law 89-600, approved on October 15, 1966, allows a person who received an other than honorable discharge from the military service to apply to the Secretary of Labor for the issuance of an Exemplary Rehabilitation Certificate based on proof of at least three years of successful rehabilitation and exemplary conduct in civilian life. Issuance of the Certificate does not operate to change the character of discharge nor to restore any veterans' benefits lost

thereby: but it qualifies the recipient for certain job counseling and employment placement assistance administered by the Department of Labor and provides tangible proof of rehabilitation.

It should be noted that recipients of honorable and general discharges are eligible for all veterans' benefits. With some few exceptions, recipients of bad conduct and dishonorable discharges are not eligible. Recipients of undesirable discharges are eligible for a few benefits and are not eligible for others; but eligibility for Veterans Administration and some Department of Labor benefits (including job counseling, employment placement and unemployment compensation) is determined by those agencies. Therefore, any recharacterization of an undesirable, bad conduct or dishonorable discharge to a general or honorable discharge would make that individual eligible for all veterans' benefits.

Question No. 13.—If, for example, as some testimony indicates, opposition to the war may have been a factor in stimulating activities which produced a general or dishonorable discharge, would it not be in the interest of society for some way to be provided for the dishonorable discharge to be wiped from the record of deserving individuals?

Answer.—"Opposition to the war" as it pertains to an individual's discharge is discussed at length in our responses to questions 3 and 4 above.

In regard to changing an ex-serviceman's discharge, our response to question 12 addresses the procedures and effects of such a change.

Question No. 14.—You mentioned in your testimony that some 944 had returned to military control. How many had done so voluntarily?

Answer.—The 944 absentees returned to military control were those individuals who had gone (or attempted to go) to foreign countries. Field reporting procedures do not require a specific identification depicting the circumstances surrounding the return of absentees to military control (voluntary return versus apprehension). However, a recent analysis in this area by the Departments of the Air Force and the Army of a representative sample of all absentees returned to military control indicated:

Air Force.—77 percent of all absentees (10 days absence or more) returned voluntarily while 21 percent were apprehended.

Army.—51 percent of all absentees returned voluntarily while 49 percent were apprehended.

Question No. 15.—Also, you indicated that 640 had been studied as to cause of desertion. Why weren't all of the 944 studied?

Answer.—The 640 figure discussed in the hearings was inadvertently used as the data base for identifying motivational factors. The identification of the anti-Vietnam factor was based on a review of individualized reports on 3,293 deserters who had gone (or attempted to go) to foreign countries. This analysis showed that 4.1 percent gave their reason for deserting as an anti-Vietnam war belief.

The figures of 640 and 944 came from the following situations. In April 1971, 722 members had returned from foreign countries. An analysis was made of 640 of these cases where action was final. Eighty-two cases in process were not considered. The figure of 944 represents the number of members who had returned from foreign countries as of February 1972, about ten months later.

Question No. 16.—Would it be possible to undertake a survey of the views of commanders, friends and families of a statistical sample of men who have deserted and not returned on the question of whether opposition to the Vietnam War was the basic reason for their desertion?

Answer.—Commanders, friends and family of absentees are sources of information on all absentees, including those who go or attempt to go to foreign countries. We believe we are receiving the maximum amount of reliable and accurate information on absentees from commanding officers and other supervisory personnel. Information received from friends (military and civilian) and families of absentees is basically on a voluntary basis and as such, we believe it is as accurate as the friends and the families know it.

[ATTACHMENT A]

U.S. (MIL. SERVICE) MILITARY ABSENTEES WHO HAVE PLACED OR HAVE ATTEMPTED TO PLACE THEMSELVES UNDER CONTROL OF A FOREIGN NATION TO PROTEST AGAINST THE U.S. OR COMMIT DISLOYAL ACTS

Absentee	Attempt (indicate nation involved)	Actual (indicate nation involved)	Date of absence	Reason given by absentee if known	Possible or suspected (other reason)	Complete disciplinary history (if not provided elsewhere)	Current status or follow-on actions to include RA/C, punishments, discharge, etc.
(Full Name) (Rank/Grade, Svc No., SSAN) (Unit) (Location of unit) DOB: POB: Citizen: Sample of original entry: DOE John James PFC, RA 12345678, 123 45-7890 Det. A, Berlin Brigade APO NY 12345 DOB: 1 Jan 48 POB: Chicago, Illinois Citizen: U.S. Sample of supplemental information: DOE John James (Supplemental Information)		Sweden	4 Nov 67	Opposed to war in VN.	Difficulties in his military and personal life. Believed to have difficulties w/German National female. (See also next column complete disciplinary history.)	SCM Feb 66 for failure to repair, sent to fort \$25.00; SPCM Jun 66 for disrespect & disobedience to superior officer, Sent to CHL 4 mos., fort \$25.00 per mo for 4 mos.	Believed to be residing in Sweden.
							EM surrendered to military police at Frankfurt, Germany, 18 Feb 68; Conv. by SPCM on 15 Mar 68, CHL 5 mos., fort \$78.00 for 5 mos., Reduced to PVT, E 1. Given an Undesirable Discharge under AR 635-212 (Unsuitability) 29 Dec 68.

[ATTACHMENT B]

ADMINISTRATIVE DISCHARGES--DOD DIRECTIVE 1332.14

Type of discharge	Examples of conditions which warrant issue of	Issuing authority
Honorable [with honor] Issuance conditioned upon proper military behavior and proficient performance of duty	Issuance is not necessarily precluded by reason of any specific conditions	Member's commanding officer or higher authority.
General [Underhonorable conditions] Issuance is appropriate when member's military record is not sufficiently meritorious to warrant Honorable Discharge	<ol style="list-style-type: none"> 1. Unsuitability <ol style="list-style-type: none"> a. Alcoholism b. Apathy c. Disfactive Attitude d. Character Disorders e. Enuresis f. Financial irresponsibility g. Homosexual tendencies h. Inaptitude 2. Any other conditions rendering character of service less than Honorable but better than Undesirable. 	Commander exercising special court-martial jurisdiction or higher authority.
Undesirable [Under conditions other than honorable] Issued for misconduct, unfitness, or security reasons based on the approval of a recommendation of an administrative discharge board, or waiver of the right to board action, or resignation or request for discharge for the good of the service (unless the particular circumstances in a given case warrant a General, or Honorable Discharge, or if the member has been awarded a personal decoration in which case a General or Honorable Discharge may be given).	<ol style="list-style-type: none"> 1. Unfitness <ol style="list-style-type: none"> a. Frequent involvement with civil or military authority b. Sexual perversion c. Drug abuse d. Sinking e. Failure to pay debts 2. Misconduct <ol style="list-style-type: none"> a. Conviction by civil authorities b. Fraudulent enlistment c. Prolonged AWOL 3. Resignation for Good of Service <p>Conduct triable by court martial with punitive (BCD or DD) discharge.</p>	Commander exercising general court-martial jurisdiction, General officer in command with Judge advocate on his staff, or higher authority.

Punitive Discharge--Title 10, U.S.C. Sec. 801-940

BAD CONDUCT: (Uniform Code of Military Justice)

DISHONORABLE: These two types of discharges are provided for by statute and may be issued only when adjudged by sentence of court-martial. A Dishonorable Discharge may be adjudged only by sentence of General Court-Martial. A Bad Conduct Discharge may be adjudged by General Court-Martial or Special Court-Martial.

[ATTACHMENT C]

CONSCIENTIOUS OBJECTORS—IN-SERVICE APPLICATIONS FOR DISCHARGE OR NONCOMBATANT SERVICE

Calendar year	Applications	1-A-0 approvals (non-combatant)	1-0 Approvals (discharge)	Number disapproved	Percent ap- provals of applications
Army:					
1965.....	101	-----	26	75	25
1966.....	118	-----	5	113	4
1967.....	185	-----	9	176	5
1968.....	282	-----	70	212	25
1969.....	943	-----	194	749	21
1970.....	1106	-----	357	749	32
1971.....	1525	-----	879	646	58
1-A-0 applications only:					
Feb 64- Sep 66.....	358	305	-----	53	85
1967.....	355	138	-----	217	38.9
1968.....	711	525	-----	186	74
1969.....	924	590	-----	334	64
1970.....	839	639	-----	200	76
1971.....	967	719	-----	248	74
Reserves not on active duty:					
1966 ²	52	1	8	43	17
1967 ²	54	1	7	46	28
1968.....	69	1	13	55	20.3
1969.....	114	1	28	85	25
1970.....	253	0	62	191	25
1971.....	335	4	184	147	56
Navy:					
1965.....	83	10	35	38	54
1966.....	149	24	33	92	38
1967.....	105	2	20	85	20
1968.....	151	6	33	112	25.8
1969.....	271	14	117	140	48
1970.....	577	20	356	211	63.4
1971.....	861	26	586	249	71
Air Force:					
1965.....	59	6	48	5	90
1966.....	64	6	38	20	67
1967.....	74	5	33	36	51
1968.....	119	7	42	70	42
1969.....	157	5	54	98	37
1970.....	286	13	106	167	42
1971.....	536	25	284	227	57.6
Marine Corps:					
March 65-December 66..	66	14	0	54	25
1967.....	56	16	2	38	32
1968.....	55	16	11	28	49
1969.....	147	47	45	55	62.5
1970.....	135	25	66	44	67.4
1971.....	157	7	51	99	36.9

¹ Includes applications from individuals separated from service prior to final board action.

² Statistics for "Army Reserves Not on Active Duty" for 1966 and 1967 reflect fiscal year data. Records not available to reflect CY data.

NOTE: Above figures include Reserves not on active duty except for Army where these statistics are shown separately

[Attachment D]

REPORT OF THE COMMITTEE ON ARMED SERVICES, U.S. SENATE, ON TREATMENT OF
DESSERTERS FROM MILITARY SERVICE (91ST CONG., 1ST SESS., MAR. 11, 1969),
PAGES 25-26, 32

ADMINISTRATIVE DISCHARGES

In the course of the hearings the subcommittee received testimony to the effect that some who had deserted to other countries and thus were beyond U.S. military jurisdiction had been discharged *in absentia*. These were adminis-

trative "undesirable" discharges. Examples mentioned indicated that such administrative discharges for deserters were given to absentees who had deserted overseas and had been gone more than a year.

Such administrative discharges for deserters, according to testimony, are based upon a Defense Department directive which authorizes such procedures. When queried with respect to the utilization of this directive, the Assistant Secretary of Defense for Manpower and Reserve Affairs, stated that the authority to discharge *in absentia*, under the pertinent directive, is not being used with respect to U.S. citizens who desert overseas. In reply to the question as to why, then, the directive is not being canceled, the subcommittee was informed, "It is not necessary to cancel it in view of the fact that the separate services are not planning to use it."

The subcommittee seriously questions the justification for the directive authorizing discharges *in absentia* for deserters. The practical effect of such a procedure is to establish a virtual statute of limitations—1 or 2 years—on the punishment for desertion. Obviously such is not conducive to proper administration of military justice. In another sense, discharges *in absentia* for desertion are, in effect, a reward for a person being a successful deserter. If he can stay in a deserter status long enough, and thus avoid returning to U.S. military jurisdiction, he is discharged administratively and he is no longer subject to apprehension or trial.

The subcommittee is firmly of the opinion that an administrative discharge does not constitute an appropriate punishment for desertion from the armed services of the United States and that, consequently, such a procedure should be discontinued. The crime of desertion is a continuing one and the deserter should be subject to trial and punishment whenever he is apprehended and is subject to U.S. military justice.

* * * * *

RECOMMENDATIONS

* * * * *

9. That discharges in absentia be discontinued in the case of deserters.

[ATTACHMENT E]
TYPICAL ABSENTEE/DESERTER PROFILE

Typical absentee/deserter characteristics						
Services	Age	Rank	Marital status	Education level	Time in service	Enlistee
Army.....	21	E-4 or below.....	Single.....	Non-high-school graduate.	20 mos.....	X
Navy.....	21-22	E-3 or below.....	Single.....	Non-high-school graduate.	First enlistment...	X
USMC.....	19-20	E-4 or below.....	Single.....	Non-high-school graduate (10-11 yrs).	12-18 mos.....	X
USAF.....	20-22	E-4 or below.....	Single.....	High school graduate.	24 mos or less.....	X*

*Joined the Air Force to avoid the draft.

Other characteristics frequently identified with the military absentee are:

1. Immature, with a history of previous personal failures.
2. A product of an unstable home (either a broken home, or a home plagued by some type of social/psychological maladjustment).
3. Has a low frustration threshold.
4. Is a repeat AWOL offender.
5. Has a history (1 out of 3) of disciplinary and administrative action.

[Attachment F]

DEPARTMENT OF DEFENSE TYPES OF DISCHARGES ISSUED TO ENLISTED PERSONNEL BY FISCAL YEAR 1950-71

Fiscal Year	Honorable ¹	Percent	General ²	Percent	Undesirable ³	Percent	Bad Conduct ⁴	Percent	Dishonorable ⁵	Percent	Total discharged	Percent discharged under honorable conditions (honorable & general)
50.....	400,267	91.33	5,527	1.26	19,255	4.39	8,659	1.97	4,317	1.03	433,235	92.59
51.....	270,658	91.33	10,146	3.42	8,374	2.32	4,231	1.41	2,851	.65	295,303	92.59
52.....	647,459	94.65	21,087	3.08	8,513	1.24	4,276	.60	2,643	.39	634,018	97.73
53.....	970,718	95.81	31,180	2.09	10,742	1.66	6,117	.63	4,403	.43	1,013,160	97.90
54.....	830,120	93.03	31,681	3.55	17,597	1.97	7,831	.87	5,097	.56	892,231	96.53
55.....	950,752	93.97	22,259	3.15	20,041	1.36	6,756	.66	2,749	.26	1,022,557	97.12
56.....	622,263	92.66	22,525	3.35	16,290	2.42	7,935	.59	4,020	.45	671,433	96.01
57.....	741,034	91.68	27,806	3.44	27,766	3.73	7,933	.93	3,647	.45	808,256	95.12
58.....	790,775	92.98	29,496	3.42	31,449	3.64	7,767	.76	2,273	.23	851,710	95.13
59.....	702,982	92.98	22,606	2.99	23,487	3.10	5,797	.80	1,149	.15	755,012	95.97
60.....	569,976	92.04	26,433	4.33	16,227	2.66	4,897	.80	961	.14	613,392	96.37
61.....	607,332	92.88	27,148	4.15	14,591	2.73	4,113	.63	643	.09	638,459	97.03
62.....	634,047	93.68	25,528	3.77	13,202	2.73	3,359	.45	533	.07	675,818	97.45
63.....	661,499	94.00	25,069	3.56	13,591	1.95	3,046	.43	538	.07	701,693	97.55
64.....	738,665	94.26	24,325	3.11	13,743	1.76	2,797	.35	447	.05	779,977	97.37
65.....	681,830	94.26	25,477	3.52	12,178	1.82	2,478	.34	312	.04	723,755	97.73
66.....	711,613	95.44	20,863	2.80	10,544	1.41	2,262	.30	273	.03	733,575	98.24
67.....	670,278	95.31	19,562	2.78	9,920	1.41	3,048	.43	381	.05	703,192	98.03
68.....	885,182	96.30	18,260	1.98	11,650	1.25	3,645	.39	442	.04	919,339	98.23
69.....	995,941	96.79	18,053	1.75	11,208	1.13	3,582	.42	487	.05	1,018,351	98.31
70.....	1,004,803	95.26	27,534	2.33	22,537	1.36	3,256	.34	533	.03	1,138,313	97.69
71.....	941,444	92.85	38,376	3.78	29,139	2.87	4,613	.45	526	.03	1,013,928	96.63

¹ This category includes all Honorable Discharges, retirements, and separations from active duty. It also includes general releases from active duty issued by the Marine Corps upon expiration of term of enlistment or obligated period of service. The following data is not available and is not included: (a) number of discharges and releases from active duty issued by the Air Force upon expiration of term of enlistment or obligated period of service. The following data is not available and is not included: (a) number of discharges issued to enlisted female members of the Army for years prior to 1951; (b) number of releases from active duty (as opposed to discharges and retirements) issued by the Navy for Fiscal Years 1950 through 1952; and (c) number of discharges issued by the Air Force for Fiscal Years 1950 through 1956.

² This category does not include the following: (a) general releases from active duty issued by the Marine Corps upon expiration of enlistment or obligated period of service, which are included in honorable separations category; (b) general discharges or releases from active duty issued by the Air Force upon expiration of term of enlistment or obligated period of service; (c) number of general discharges issued to enlisted female members of the Army for years prior to Fiscal Year 1961; (d) number of general discharges issued by the Air Force for Fiscal Years 1950 through 1956.

³ This category does not include the following data, which is unavailable: (a) number of undesirable discharges issued to enlisted female members of the Army for years prior to Fiscal Year 1961, and (b) number of Undesirable Discharges issued by the Air Force for Fiscal Years 1950 through 1956.

⁴ This category does not include the following data, which is unavailable: (a) number of Bad Conduct Discharges issued to enlisted female members of the Army for years prior to Fiscal Year 1961, and (b) number of Bad Conduct Discharges issued by the Air Force for Fiscal Years 1950 through 1956.

⁵ This category does not include the following data, which is not available: (a) number of Dishonorable Discharges issued to enlisted female members of the Army for years prior to Fiscal Year 1961, and (b) number of Dishonorable Discharges issued by the Air Force for Fiscal Years 1950 through 1956.

ASSISTANT SECRETARY OF DEFENSE,
Washington, D.C., June 14, 1972.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: This is in further response to your letter of April 11, 1972, requesting supplemental information on military absentees as it relates to the February 1972 hearings on draft procedures and administrative possibilities for amnesty.

Our letter of April 26, 1972 provided the majority of information requested. The discharge statistics for 1941-1945 were not available; however, the Military Departments (Army and Navy) have researched their historical files and furnished such statistics that were available. The enclosed charts reflect this information.

I trust the above information will be of interest to you.

Sincerely,

LEO E. BENADE,
Major General, U.S.A.,
Deputy Assistant Secretary of Defense.

Enclosures.

DEPARTMENT OF ARMY DISCHARGE STATISTICS 1941-45

Calendar year	Unfitness		Inaptitude or unsuitability		Total	
	Number separated	Annual rate per 1,000 mean strength	Number separated	Annual rate per 1,000 mean strength	Number separated	Annual rate per 1,000 mean strength
1942.....	2,153	0.7	3,486	1.2	5,639	1.9
1943.....	14,263	2.3	40,134	6.5	54,397	8.8
1944.....	16,049	2.3	41,135	5.8	7,184	8.1
1945.....	8,191	1.2	37,629	5.7	45,820	6.9

NOTE: Based on information reflected in historical files. It is assumed that the discharges reflected above were issued under less than honorable conditions.

U.S. NAVY ENLISTED SEPARATIONS, FISCAL YEARS 1941 THROUGH 1945; DISCHARGE STATISTICS, 1941-45

Fiscal year	Honorable ¹ separations	Per- cent	Undesirable discharges	Per- cent	Bad conduct discharges	Per- cent	Dishonorable discharges	Per- cent	Total
1941 ²	24,335	92.9	379	1.4	1,420	5.4	70	0.3	26,204
1942.....	55,768	94.7	1,080	1.8	1,590	3.4	60	0.1	58,898
1943.....	75,672	94.4	2,324	2.8	4,701	5.7	90	0.1	82,787
1944.....	112,587	91.7	3,723	3.0	6,372	5.2	103	0.1	122,785
1945.....	180,435	93.0	4,576	2.4	8,620	4.5	283	0.1	193,914

¹ Further breakdown of honorable separations not available.

² Naval Reserve personnel information not available for 1941.

U.S. MARINE CORPS ENLISTED SEPARATIONS DISCHARGE STATISTICS 1941-45
(Retirement Included Fiscal Years 1941 thru 1945)

Fiscal year	Honorable ¹ separations (retirement included) (percent)	General discharges (percent)	Undesirable discharges (percent)	Summary ² courts-martial (percent)	General ² courts-martial (percent)
1941.....	4804 (40) (81.38)	158 (2.67)	501 (8.48)	387 (6.55)	53 (0.89)
1942.....	7046 (36) (76.11)	985 (10.64)	673 (7.27)	437 (4.72)	117 (1.26)
1943.....	22097 (48) (80.50)	4218 (15.37)	767 (2.79)	258 (0.94)	111 (0.40)
1944.....	33206 (52) (85.63)	4941 (12.74)	524 (1.35)	60 (1.15)	50 (0.13)
1945.....	62165 (51) (94.76)	2677 (4.08)	520 (0.79)	149 (0.23)	95 (0.14)

¹ Includes all enlisted separations less general and undesirable discharges and discharges for reasons of summary court-martial and general court-martial.

² Records do not reflect bad conduct or dishonorable discharges during the period, only number discharged for reasons of sentence by type court-martial.

3. JUSTICE DEPARTMENT RESPONSES TO QUESTIONS FROM SUBCOMMITTEE
QUESTIONS FOR KEVIN MARONEY, DEPARTMENT OF JUSTICE

(1) Could you indicate whether following the Welsh and Gutknecht decisions, there was any notification of individuals who then were serving time for having violated Selective Service laws?

(2) How many Selective Service law violation convictions had occurred between 1965 and the Welsh decision? Between 1965 and the Gutknecht decision?

(3) Would it not be a manageable task to inquire into those cases to determine if there are those individuals, either serving time, or still with the stigma of a felony conviction after serving time, whose convictions might have been affected by those decisions? For instance, would this be a task that a special commission under the pardon attorney might undertake? What would be the estimated cost of such a review?

(4) How many cases were reported each month by the Selective Service System during the past year? Could you break those cases down by violation: (1) refusal to submit for induction or civilian work; (2) failure to keep current address; (3) failure to report for physical exam; (4) other (explain)?

(5) How many cases were disposed of each month during the past year by: (1) decision not to prosecute because of error disclosed in file compromising work order;

(2) decision not to prosecute because registrant established other bona fide excuse for failure to comply with order (accident or illness);

(3) because registrant agrees to accept induction or civilian work or other obligation;

(4) by judicial dismissal because of error disclosed in file; by judicial dismissal because defendants agreed to submit to induction, civilian work or other requirement; by conviction on guilty plea; by conviction on not guilty plea; by conviction on nolo contendere plea; by acquittal.

(6) In your statement on page 2, you state that as of February 14, there were 4,201 fugitives against whom federal arrest warrants were outstanding based upon indictments. What would be the oldest warrant, what would be the most recent?

(7) At the end of January you note that 6,000 indictments against defendants were pending. What is the oldest? What is the average age of the indictments? You show some 3,351 as being filed between July and January, and 6,091 total. Does that mean you started the year with no pending indictments?

(8) You also cite some 80 percent of the 12,333 cases which the Selective Service System had sent to U.S. attorneys which you say will be dismissed without prosecution. How many are dismissed because of error disclosed in the file which compromises the induction order?

(9) What kinds of error do you find? And could you give us some idea of the proportions involved?

(10) In the letter from Mr. Mardian, he states there are 1,441 individuals in the U.S. who have been charged with Selective Service Act violations and who are considered fugitives. He also states there are some 2,700 others who are fugitives living in other countries. Could you give us some idea of the magnitude of the Government's investigative resources which are being used to locate them? How many FBI agents? Electronic surveillance? What is the total cost of that activity?

(11) The subcommittee has been informed that some families of individuals indicted for Selective Service violations and assumed to be living in other countries have been the subject of investigation. Is continual or intermittent surveillance of those families customary?

DEPARTMENT OF JUSTICE,
Washington, D.C., May 18, 1972.

Senator EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: This is in response to your letter of April 11, 1972, submitting a series of questions, supplementary to my appearance at the hearing on March 1, 1972, relating to the enforcement of the Military Selective Service Act.

I shall endeavor to answer your specific inquiries in the order in which they appear in your letter.

1. Subsequent to the Supreme Court decisions in *Gutknecht* and *Welsh*, the Department of Justice did not directly notify any individuals who were serv-

ing prison sentences for violations of the Selective Service Act about these decisions. Nonetheless, we are certain that a substantial number of these individuals were apprised of these decisions through their attorneys, as well as through the news media. This is evidenced by the volume of applications for relief filed by these individuals through habeas corpus petitions.

2. Data provided by the Administrative Office of the United States Courts reflects that between fiscal year 1965 and June 15, 1970, when the *Welsh* case was decided, there were 4,077 convictions for violations of the Military Selective Service Act. Between fiscal year 1965 and January 31, 1970 (12 days after the *Gutknecht* case was decided) there were 3,597 convictions for violations of the Act.

3. As to the question whether individuals are still imprisoned for selective service violations, whose convictions may have been affected by the *Welsh* or *Gutknecht* decisions, I invite your attention to my letter of March 29, 1972, wherein I noted that, although precise statistics are not available to fully answer the question, nevertheless, according to the Bureau of Prisons, the average time served in prison by draft law violators during the period 1968 through January 1970 was 16 months. Since 22 months have elapsed following the Supreme Court's decision in *Welsh* and 26 months since the decision in *Gutknecht*, I believe it may be safely assumed that individuals who were convicted prior to these decisions are no longer imprisoned. Moreover, I do not believe that it would be manageable for the pardon attorney or a special commission to undertake a project to obtain specific data, since, as I indicated in my March 29th letter, such an undertaking would necessarily require the review of literally thousands of selective service files, trial transcripts and appellate briefs in all of the 93 judicial districts in the United States in order to determine which cases may have been affected by these decisions. The cost of such a project would be inestimable.

4. The data received by the Department of Justice from United States Attorneys concerning selective service violations within their districts does not include a break-down of the *specific* violations of the Act handled by their offices. However, the Department statistics reflect that from the period March 1971 to September 1971, the following violations of the Selective Service Act were reported by the United States Attorneys:

Number of Violations:

March 1971	2,787
April 1971	2,306
May 1971	1,491
June 1971	2,677
July 1971	2,874
August 1971	1,771
September 1971	1,403

The National Headquarters, Selective Service System initiated a reporting system in October 1971 which reflects the number and types of Selective Service Act violations reported monthly by the State Directors to the United States Attorneys. Their report, which is current through February 1972, reflects the following:

	Failure to report for induction	Refusal to submit to induction	Failure to comply with work order	Failure to register	Failure to give local board address	Other *
October 1971	521	49	20	78	13	271
November 1971	389	90	53	30	17	289
December 1971	636	165	58	12	30	94
January 1972	554	109	27	25	42	76
February 1972	270	48	18	35	31	125

* Other: This category would encompass failure to report for physical examination; local board depredations; harassment of local board employees, etc.

5. A recently completed survey by the Internal Security Division shows that during the period March 1971 through February 1972, a total of 2,021 selective service indictments were authorized to be dismissed for various reasons. Unfortunately, our internal procedures for categorizing the bases for dismissal of these indictments does not comport with all of the categories which you have outlined in your letter. However, we believe that the following information compiled by the Division as to the dismissal of selective service indictments may be useful:

	Dismissed because defendant submitted to induction or alternative civilian work or made a bona fide attempt to submit to induction	Dismissed because the defendant's classification was punitive (Gulknacht)	Dismissed because the local board had no basis-in-fact for classification given	Dismissed because of an irregularity in the proceedings classifying defendant	*Dismissed for miscellaneous reasons	Convictions	Acquittals
March 1971.....	42	0	5	0	20	105	31
April 1971.....	83	2	4	21	22	101	30
May 1971.....	87	1	1	44	32	138	23
June 1971.....	125	1	0	22	24	138	15
July 1971.....	78	4	1	28	26	83	21
August 1971.....	102	5	1	21	25	125	24
September 1971.....	56	1	0	37	8	101	14
October 1971.....	97	3	1	22	29	136	25
November 1971.....	195	9	1	24	23	160	25
December 1971.....	161	3	1	18	31	127	32
January 1972.....	190	3	4	13	42	180	23
February 1972.....	149	4	1	33	30	171	31
Totals.....	1,365	36	23	285	312	1,565	293

*Miscellaneous Reasons: Defendant was a Jehovah's Witness who agreed to perform alternative civilian work on order of the court; State Director requested further review of delinquent's file, etc.

6. The oldest outstanding warrant of arrest was issued by the District Court for the Northern District of California, on August 24, 1947, based on an indictment returned by a grand jury on June 11, 1947. This indictment charged the defendant with failure to submit to induction. It is believed that the defendant, who is a fugitive, is presently residing in Mexico. We would assume the most recent warrant of arrest would have been obtained on this date, since such warrants are obtained on almost a daily basis.

7. It is believed that out of approximately 6000 indictments outstanding against selective service violators at the end of January 1972, the oldest indictment is the one to which we refer in the preceding paragraph.

We have no available information which reflects the average age of pending selective service indictments. In order to compute such information it would be necessary to request 93 United States Attorneys to undertake a survey of all outstanding indictments. I am certain you appreciate that undertaking such a project would be extremely time consuming and expensive.

With regard to your inquiry concerning pending indictments, our statistics for any given period of time commence with the total pending indictments at the beginning of such period. Thus, on January 1, 1971, there were 4499 indictments pending against selective service violators. To this figure was added a total of 6118 new indictments returned during 1971. During the same period 4500 indictments were terminated, leaving 6117 indictments pending on January 1, 1972. This latter figure will be the starting point for the computation of the statistics for year 1972.

8. Statistics reported to us by the United States Attorneys do not include information which would permit us to compute precisely the percentage of reported selective service violations which are dismissed following a pre-indictment review of selective service files based on errors which invalidate induction orders.

9. The following is a listing, in order of their frequency of occurrence, of procedural errors which are found generally during pre-indictment reviews necessitating return of the files to local boards for reprocessing:

1. No basis-in-fact for I-A classification;
2. No reason stated by the local board for rejecting claim for deferment;
3. File of registrant who timely filed *prima facie* claim for deferment not considered by the local board;
4. After reclassifying registrant, local board fails to advise him of his rights of personal appearance and of appeal;
5. Clerk of local board gives incorrect advice as to the registrant's substantive or procedural rights;
6. Lack of scienter because induction order mailed to registrant was returned to local board as undelivered;
7. Induction was postponed for more than the permissible 120 days from the original date for reporting;
8. Registrant ordered to report for induction more than one year after taking preinduction physical was given only a physical inspection rather than an examination at the induction station contrary to Army regulations.

10. In the course of executing arrest warrants in cases involving Selective Service violations, the F.B.I. normally interviews the defendant's parents, relatives and friends. If such investigation discloses that the defendant is outside the United States, the Bureau as a matter of practice advises the United States Immigration and Naturalization Service of the outstanding indictment, so that lookout notices may be posted for the defendant at ports of entry.

Electronic surveillance, as an investigative technique, is not employed in locating fugitives who are under indictment for violating the Military Selective Service Act.

This Division has no information as to the cost involved in the Bureau's efforts to locate fugitives.

11. It is my understanding that The F.B.I. does not customarily resort to either continual or intermittent surveillance of families of selective service fugitives believed to be residing in foreign countries. However, as a normal investigative practice, F.B.I. agents may visit periodically parents and former associates of a fugitive to determine if the fugitive has made any current contact with them.

I trust the foregoing will provide for you the necessary information, and if I can be of any further service please let me know.

Sincerely,

KEVIN T. MARONEY,
*Deputy Assistant Attorney General,
Internal Security Division.*

4. LETTER FROM SENATOR EDWARD M. KENNEDY TO ASSISTANT ATTORNEY GENERAL
ROBERT C. MARDIAN (FEB. 10, 1972) AND RESPONSE

FEBRUARY 10, 1972.

MR. ROBERT C. MARDIAN,
*Assistant Attorney General, Internal Security Division, Department of Justice,
Washington, D.C.*

DEAR MR. MARDIAN: It is my understanding that your division is now handling the prosecution of Selective Service law violators. The Senate Subcommittee on Administrative Practice and Procedure is holding a set of hearings affecting the Selective Service system administration.

For that reason, I would be particularly hopeful that you would be able to offer testimony that would help clarify the experience of your department in fulfilling its law enforcement responsibilities under the Selective Service Act. In that regard, I of course would be interested in the Justice Department viewpoint on the policy considerations involved in granting amnesty, particularly as it affects pardons and paroles. But I would hope that you also would be able to provide the Subcommittee with hard data on the numbers of individuals believed to be in exile abroad, the numbers of individuals avoiding prosecution for Selective Service prosecution in the U.S., the numbers of complaints now pending, and the recent experience of the Department in the prosecution of Selective Service law violators.

I would hope that you would be able to appear on this subject on February 29 or March 1.

Thank you for your consideration.

Sincerely,

EDWARD M. KENNEDY.

DEPARTMENT OF JUSTICE,
Washington, D.C. February 23, 1972.

HON. EDWARD M. KENNEDY,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR: This is in response to your letter of February 10, 1972, advising that the Senate Subcommittee on Administrative Practice and Procedure, which is holding hearings affecting the administration of the Selective Service System, is desirous of certain information concerning the experience of the Department of Justice in fulfilling its law enforcement responsibilities under the Military Selective Service Act.

On January 1, 1971, the Attorney General assigned the supervisory responsibility over the Military Selective Service Act to the Internal Security Division. The responsibility of this Division is to establish policies and procedures to insure the uniform enforcement of the Act, and to supervise the United States Attorneys in the conduct of criminal prosecutions under this Act. In this connection, it is incumbent upon this Division to give advice, instruction, and assistance to the United States Attorneys with respect to questions of law, policy, and procedure in all criminal cases and matters arising under the Act.

I shall endeavor to answer the specific inquiries in your letter in the order in which they were raised:

1. Any provision for clemency, at this time, would be in contravention of the executive policy recently enunciated by President Nixon on two specific occasions. The President clearly rejected any consideration of amnesty at this time, while hostilities continue and American soldiers remain as prisoners of war in North Vietnam.

Historically, a grant of amnesty to males, who have refused to serve their country during a period of time when the country was engaged in actual hos-

ilities, is without precedent. The President's policy is in consonance with the acts of past Presidents. Only twice in our history has a President accorded clemency to persons who refused to comply with the draft laws and serve their country. On both occasions clemency was granted only after cessation of hostilities, and it was granted only to those draft resisters who had been convicted of their offenses. In 1933, President Franklin D. Roosevelt granted pardons and restored citizenship to about 1,500 persons who had been convicted of violating the Draft and Espionage Acts during World War I. In 1947, President Harry S. Truman granted pardons which restored civil and political rights to 1,523 individuals who had been convicted of draft evasion and sentenced under the Selective Service Act during World War II.

With respect to the question of parole, it should be observed that in situations where an individual has been convicted of refusing induction or performance of civilian work as a conscientious objector and has been remanded to the custody of the Attorney General, he has the right under existing Selective Service Regulations (32 C.F.R. 1643.1-1643.13) to apply for release from such custody of parole for service in the Armed Forces or to perform alternative civilian work. Although the present regulations contain no provision for the pardoning of such paroled individuals who served in the Armed Forces or performed alternative civilian work, nevertheless, the right to seek a Presidential pardon is, of course, available to them.

2. Our information indicates that as of February 14, 1972, there were 4,201 fugitives against whom federal arrest warrants were outstanding based upon indictments filed as well as criminal complaints issued for selective service law violations. Of this number approximately 2,300 are believed to be in Canada; and approximately 460 are thought to be residing in various other foreign countries. Thus, the balance of approximately 1,441 defendants, whose whereabouts are unknown, are believed to be living in the United States.

As of the end of January 1972, there was a nationwide total of 6,091 defendants against whom indictments were pending and 12,333 pending cases reported by the Selective Service System to United States Attorneys for violations of the Selective Service law. These pending cases are awaiting completion of FBI investigations and processing by the United States Attorneys to determine whether the facts warrant presentation to the grand jury for indictment. Based upon our experience during the past year, it is expected that about 80 per cent of these cases will be dismissed without prosecution, because the completed investigations will likely reveal that the delinquencies were incurred inadvertently and subsequently corrected, that there were valid excuses for apparent delinquencies, or that the registrants will rectify their delinquencies, e.g., by reporting for induction.

3. Our recent experience in the prosecution of selective service law violators shows that on the average about 40 per cent of registrants ordered to report for induction fail initially to comply with the orders. However, approximately 80 per cent of these registrants eventually comply with selective service requirements and thus remove their delinquencies. The remaining 20 per cent, following completion of an FBI investigation, are indicted; and a substantial percentage of these are allowed to purge their violations by consenting to induction. Their indictments are then dismissed.

The following tables reflect the prosecutive activity during the first seven months of the current fiscal year:

NEW INDICTMENTS

	Filed	Terminated	Total pending
July.....	440	299	8,050
August.....	556	309	5,714
September.....	639	262	6,063
October.....	511	311	6,250
November.....	321	439	6,133
December.....	455	426	6,117
January.....	525	551	6,091
Totals.....	3,351	2,707	6,091

THE BREAKDOWN OF CASES TERMINATED IS AS FOLLOWS:

	Guilty	Not guilty	Dismissed or otherwise terminated
July.....	83	20	196
August.....	125	24	240
September.....	101	14	177
October.....	136	25	150
November.....	160	25	254
December.....	127	32	267
January.....	180	23	348
Totals.....	912	163	1,532

As earlier noted, the substantial number of dismissals of indictments is due primarily to the fact that a great number of indicted draft delinquents choose to submit to induction or enlistment rather than stand trial. In this regard, the Department of Justice has, as a matter of policy, declined prosecution, where, in the absence of aggravating circumstances, draft resisters display a "change of heart" and belatedly submit to induction, or where conscientious objectors submit to an order to perform alternative civilian work.

It should also be pointed out that the number of draft violators who have experienced a "change of heart" and elected to submit to induction or alternative civilian work has increased significantly in the past several months. During the past five months 72 indictments were dismissed because indicted registrants voluntarily submitted to induction.

The recent acceleration in the trial and termination of selective service cases was undertaken primarily to assure the defendants of their constitutional rights to a speedy trial. In addition, this accelerated activity is intended to effect a more faithful compliance with the mandate of Congress, incorporated into the Act itself, requiring the Attorney General to give priority to the trial of selective service cases.

I believe that the foregoing information fully responds to questions in your letter to me of February 10, 1972. In these circumstances, it does not appear that any useful purpose would be served by my personal appearance before your Committee on February 29 or March 1. Moreover, I am scheduled to appear on those dates before the House Subcommittee on Appropriations to testify concerning this Division' budget for the next fiscal year. In the event, however, you desire further information concerning our handling of the prosecution of Selective Service violators, I am arranging for Mr. John H. Davitt, Chief of our Criminal Section, to appear before the Committee at 10:00 A.M. on February 29, or such other time as your staff advises him to be present. Mr. Davitt is the section chief immediately responsible for the supervision of Selective Service matters for this Division and will be in a position to furnish whatever additional details the Committee requires.

Sincerely,

ROBERT C. MARDIAN,
Assistant Attorney General,
Internal Security Division.

5. AMERICAN ETHICAL UNION ON CONSCIENTIOUS OBJECTION: SELECTED PUBLIC AFFAIRS RESOLUTIONS

FOR RECOGNITION AS CONSCIENTIOUS OBJECTORS OF PACIFISTS ON NONTHEISTIC GROUNDS

Ethical Societies are religious Fellowships. As such we recognize the right and duty of our members to follow the dictates of their own conscience and religious convictions in all matters including the non-pacifist or pacifist positions.

Further we maintain that those rights which are provided in law entitling members of theistic religious fellowships to recognition of their status as conscientious objectors shall be available to those who hold the pacifist convictions on non-theistic grounds.

Whereas the Selective Service Act of 194 is narrowly constricted in these areas:

It is hereby resolved that the Congress of the United States be petitioned to amend the Act so that the restrictive definition of 'religious training and belief' be stricken from the present Act and that the wording of the 1949 Act be restored with the addition 'or personal conviction' immediately following 'religious training and belief', and that 'military' be substituted for 'combatant', to read as follows:

"Nothing contained in this Act shall be construed to require any person to be subject to military training and service in the armed forces of the United States, who, by reason of religious training and belief or personal conviction, is conscientiously opposed to participation in war in any form."

New Rochelle, N.Y., 1959.

FOR RECOGNITION OF NONTHEISTIC CONSCIENTIOUS OBJECTORS

Whereas the Selective Service law now provides for conscientious objection to military service only if based upon "religious training and belief" and defines religion in terms of belief in a "Supreme Being", and:

Whereas we believe an official theological definition of religion lies beyond the proper province of secular government and violates the first amendment of the United States Constitutions; and

Whereas this definition of religion violates the principles of the American Ethical Union which is a religious Movement founded in 1876 and based upon deeply felt ethical values rather than belief in a Supreme Being; and

Whereas many young men of this and similar religious persuasions are sincere conscientious objectors; and

Whereas other young men who are sincere conscientious objectors do not define their life philosophies in religious terms; and

Whereas the United States Supreme Court has found that conscientious objection is entitled to legal recognition when based upon a belief that "occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God": Now therefore be it

Resolved That the Congress of the United States be petitioned to amend the Selective Service Act by removing the clause restricting the definition of religion to belief in a Supreme Being and making additional provision for conscientious objection based upon philosophical conviction.

Board of Directors, January 1967.

FOR RECOGNITION OF CONSCIENTIOUS OBJECTION TO PARTICULAR WARS

Whereas the development and exercise of individual conscience is encouraged by the highest teachings of the world's greatest philosophies and religions; and

Whereas the American legal heritage has honored and protected the highest degree of liberty for the individual conscience; and

Whereas the consciences of many men compel them to object to particular wars and military acts even though they do not claim to be absolute pacifists or to object to every war which could conceivably arise; and

Whereas the convictions of such men are often just as strong and sincere as the convictions of absolute pacifists and equally deserving of legal recognition: Now therefore be it

Resolved That the American Ethical Union call upon Congress to amend the Selective Service Act to provide legal recognition for conscientious objection to particular wars.

Board of Directors, January 1967.

SUPPORT OF, OR OPPOSITION TO WAR A MORAL QUESTION

War is a violation of mankind's age-old dream of world peace. It is contrary to mankind's noblest ethical ideals and in conflict with the highest teachings of all the great religions and philosophies of the world. It represents a failure in mankind's current aspirations for peace as expressed in the United Nations; determination "to save succeeding generations from the scourge of war."

Wars in our time have taken the lives of millions of human beings, spread terror and pain, destroyed families and crushed children's hopes for joy in

life. Since the advent of the nuclear era the continuation of war threatens the survival of civilization and possibly even the survival of the human race.

Whereas all governments now recognize that the only possible public justification for war or the threat of war is defense against aggression, and recognizing this, tend to place total blame on the adversary and to justify themselves as acting in self-defense; and

Whereas governments often make use of deliberate falsification, intensive propaganda and fervent appeals to patriotism to gain popular support for totally unjustified wars; and

Whereas on questions of war and peace the individual has an ethical obligation to be responsive to the system of world law which is evolving under the United Nations; and

Whereas the Nuremberg War Crimes Trials have enunciated the principle that obedience to political authorities does not relieve the individual of moral responsibility for his actions; and

Whereas unless individual citizens are willing to make their own judgments on the morality of a war, there will be no effective internal restraints on the war-making powers of their governments; and: Now therefore be it

Resolved That the Fraternity of Leaders of the American Ethical Union declares the question of individual participation in or support of war to be a moral question of the highest order, a question which cannot rightfully be ignored. When any person is called upon to support a war effort, he should listen to the leaders of his government, seek out the most objective available news sources and then make a moral decision in the light of his own ethical values and his responsibility to the world community as well as to his own nation. The fact that his government offers him a ready-made moral position in no way absolves him from the responsibility for making his own decision.

If he concludes that his government is morally and legally right, he should give it his wholehearted support. If he concludes that his government is wrong, he should oppose its policy with equal vigor. When an individual who is liable for military service concludes that a war is wrong, he has not only the moral right but the moral responsibility to announce himself as a conscientious objector. What is ethically imperative for persons of all ages is that they make a moral decision.

AEU Fraternity of Leaders, January 1967.

ON CONSCIENTIOUS OBJECTION

Ethical Culture is a religious Movement founded in America in 1876. It is organized in local Societies with full-time professional Leaders who perform services like those of ministers and rabbis. Its national organization is called the American Ethical Union.

Throughout the history of Ethical Culture its Leaders have taught that an ethical concern for the well-being of all mankind should be central in religion and in life—that this concern should transcend the division of mankind in various races, religions and nations—and that all human beings have a worth and dignity which must not be violated by treating them merely as means to our own ends.

These values have led many members and friends of Ethical Culture to a pacifist position on war, and many others with equally sincere convictions to a non-pacifist position. The American Ethical Union does not attempt to answer this question of conscience for its members, but it does declare the question of individual participation in or support of war to be a moral question of the highest order, a question which cannot be rightfully ignored.

When a young man who is liable for military service believes that war is wrong he has not only the moral right but the moral responsibility to announce himself as a conscientious objector. No matter whether such young men have grown up in our religious fellowship or have independently come to share our ethical and religious values, we will endeavor to assist them in thinking through their conscientious positions and in securing their full legal rights.

We invite such young men, including those who are below draft age, to register their convictions with the Fellowship of Ethical Pacifists, 2 West 64th Street, New York, N.Y. 10023 and to call upon its services or the services of the Ethical Culture Leader in their community. The Fellowship of the Ethical Pacifists is a religious association within the American Ethical Union and an affiliate of the Fellowship of Reconciliation.

St. Louis 1968.

FOR REMOVAL OF SUPREME BEING QUESTION FROM SELECTIVE SERVICE FORM

Whereas the Selective Service Form 150 (Special Form for Conscientious Objector) includes the question: "Do you believe in a Supreme Being?" and;

Whereas Congress, in the Military Service Act of 1967, specifically removed this requirement from the law; and

Whereas the presumption that religion can be defined only in terms of a Supreme Being violates the principles of the American Ethical Union, which is a religious Movement founded in 1876 and based upon deeply felt ethical values rather than belief in particular theological doctrines; and

Whereas this question may be prejudicial against the applications of many sincere young men of this and similar religious persuasions who do not define their religious convictions in terms of a Supreme Being; and

Whereas the American Ethical Union has long held that an official theological definition of religion lies beyond the proper province of secular government and is a violation of the First Amendment to the United States Constitution: Therefore be it

Resolved That the American Ethical Union call upon the Director of Selective Service, the President of the United States, and other appropriate officials to remove the "Supreme Being" question from SSS Form 150; and be it further

Resolved That while this question remains in SSS Form 150, the American Ethical Union advise young men who are conscientious objectors as follows:

1. Those who in principle object to this question because it violates their ethical and religious integrity should note on the form that they understand this is no longer a requirement and may cite this resolution in support of their stand.

2. Those who have no principled objection to the question and wish to answer it affirmatively should be aware that during the period when the Supreme Being requirement was in the law the Supreme Court found that it was fulfilled by any belief which "occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God."

St. Louis, 1968.

REAFFIRMING SUPPORT OF CONSCIENTIOUS OBJECTORS

Whereas prior Assemblies have consistently supported those in our Movement whose convictions cause them to take the position of conscientious objection to participation in war; and

Whereas the Military Selective Service Act of 1967 provides for legal recognition of any person who, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form", and;

Whereas in adopting the 1967 Act, Congress removed the earlier requirement that religious training and belief include belief in a Supreme Being, and the Selective Service System subsequently removed the "Supreme Being" question from its Special Form for conscientious objectors; and

Whereas many sincere young men whose conscientious objection is based upon liberal or humanistic religious beliefs, nevertheless continue to encounter serious difficulties in obtaining legal recognition as conscientious objectors; Therefore be it

Resolved That we reaffirm: that it is the right and duty of our members to follow the dictates of their religious convictions, and that when a young man believes that war is wrong, it is not only his right but his responsibility to announce himself as a conscientious objector; and be it further

Resolved That the American Ethical Union continue to offer its counsel and assistance to conscientious objectors and including especially those whose objection is based on liberal humanist religious beliefs whether or not they are formally affiliated with our Movement; and be it further

Resolved That we encourage, urge and sanction that young men make their decision with respect to service in the armed forces on the basis of religious conviction, and that such young men be made aware of our unqualified recognition of the validity of a sincere conscientious belief and of an objection to participation in war in any form which is based on such belief.

White Plains, N.Y., 1969.

G. COLBOUN, JACK. "AMNESTY IN 1947: A BAD DEAL"

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I. AMNESTY AND THE COLD WAR

When asked in May 1971 what he thought about the probability of an amnesty being granted to Indochina war resisters, Selective Service Director Curtis Tarr replied that it was certain some type of amnesty would be considered after the war ended. "My guess is that the precedent set after World War II will loom very large." He went on to say, "a case-by-case analysis makes a lot of sense. The nation would probably be better off if it could put rancor aside and seek justice on the basis of equity instead of emotionalism."

At this time very little is known about the Presidential amnesty granted by Harry S. Truman on December 3, 1947. There is little easily accessible material on the Truman amnesty. Moreover, the text of the Amnesty Declaration, which pardoned a mere 1,523 of 15,805 Selective Service violators, should be placed in a historical perspective and discussed in the light of contemporary events.

The power of pardon is granted to the President under Section Two of Article II of the U.S. Constitution. As noted by the Committee for Amnesty after World War II:

"The President's power to grant amnesty has been repeatedly exercised since 1795, when Washington pardoned all participants in the Whiskey Rebellion and it has never been seriously questioned. Presidents Adams, Madison, Lincoln, Johnson, Wilson, Coolidge and Franklin D. Roosevelt also declared amnesties. On Christmas Eve, 1945, President Truman himself proclaimed a full pardon to several thousands of ex-convicts who had broken Federal laws but later served meritoriously in the armed forces".¹

After the American Revolution most states quickly adopted a lenient policy toward American Loyalists, and even those states which had passed the most harsh anti-Loyalist laws had repealed them by 1790.² It should be kept in mind that many Loyalists directly aided the British during the war and many fought alongside the Red Coats against the Rebels. On Christmas Day, 1868, President Andrew Johnson proclaimed a complete amnesty for those who fought against the Union in the Civil War.³ In the 1920's Presidents Harding and Coolidge on different occasions granted full pardons to violators of World War I's Sedition and Espionage Acts. It was not until 1933, however, that FDR pardoned the remaining 1,500 World War I draft violators and Sedition and Espionage Acts violators.⁴

Quite clearly when considering amnesty after World War II, Truman was faced with a long legacy of Presidential amnesties behind him if he chose to grant a general amnesty to Selective Service violators. Historically the American people have welcomed rebels and objectors, after the immediate passions have cooled. The 1947 amnesty, however, offers us a distinctly different case, one which was based not upon popular considerations but upon the dictates of Cold War expedients.

In 1946, for example, the *New York Times* editorialized in favor of a general amnesty for conscientious objectors:

"The private conscience is one of democracy's most precious possessions. Indeed, the liberty allowed it is a basic test of whether or not democracy exists in a nation. We believe President Truman will be amply justified and supported, even by the veterans who bore the brunt of battle, if he grants the amnesty petition. General McNarney . . . ordered 4,000 prisoners in the American zone in Germany released. If we can forgive our enemies in this way surely we can forgive our fellow citizens who honestly could not accept the majority view in time of war."⁵

As early has 1945 public opinion was quite favourable to the C.O. according to the findings of Princeton sociologist Leo P. Crespi. Based on a scale of 0 to 100 with 0 being "I would treat a Conscientious Objector no differently than I would any other person, even so far as having him become a close relative by marriage," and 100 being "I feel that Conscientious Objectors should be shot

¹ *New York Times*, July 14, 1946, IV, 8:5. Letter from the Committee for Amnesty.

² Wallace Brown, *The Good Americans: The Loyalists in the American Revolution*, (New York, 1969), pp. 179-80, 251.

³ *New York Times*, December 25, 1933, 1:1.

⁴ *New York Times*, December 25, 1933, 1:1 and December 16, 1923, 1:6.

⁵ *New York Times*, November 24, 1946, E, 8:1.

as traitors," the majority of respondents chose an answer of 20 degrees or less.⁶

However, by 1947 the N.Y. Times, in spite of public opinion, performed an editorial about-face concerning the role of conscience in a democracy by supporting the role of conscience in a democracy by supporting the conclusion of the Truman Amnesty Board that those who claimed objection because of "intellectual, political or sociological convictions" should not be pardoned:

"It is a stated principle that is fundamental in a democracy, where the majority rules with due respect for the rights of the minority, when it decided that it would not recommend restoration of civil rights to those persons who thus have set themselves up as wiser and more competent than society to determine their duty to come to the defense of the nation.

Nations could not exist, nor any orderly society, if the views of this small minority were to prevail. There comes a time when the collective wisdom and the collective conscience of a people must govern the action of all."⁷

A basic transformation in American politics was in the process of creation and the Times' editorial shift reflected this; the injustice of the Truman amnesty was one of the first of many consequences of the emergence of Cold War politics.

From 1945 to 1947, the tenor of White House statements and news releases regarding the Soviet Union was relatively reasonable and tolerant. "This tolerance was an early victim of the Cold War. The information presented to the public after 1947 *** became increasingly anti-communist."⁸ The Truman Administration was faced with a difficult situation, one of emerging victoriously from World War II and bent upon retaining the world dominance which resulted from the war effort. At the war's end the American people were quite anxious to return to peacetime pursuits. Truman was left facing a public clamoring for demobilization while he concurrently needed abnormally large military forces to protect and expand America's newly won global interests. One means of convincing the public of the need for continued military vigilance was the purposeful distortion and creation of false hysteria about the intentions of the Soviet Union in the postwar world.

"*** there were a good many men who shared the attitude of Senator Arthur K. Vandenberg. He thought it was necessary 'to scare the hell out of the American people' in order to win their active approval and support for the kind of vigorous anti-Soviet policy he wanted. Those men did consciously employ exaggeration and oversimplification to accomplish their objectives."⁹

One practical means of maintaining large military forces was peacetime conscription which could be justified as a simple formula for protecting the war-battered free world from Soviet aggression.

A general amnesty pardoning war resisters would seriously hamper the efficiency of future peacetime drafts. Justice for conscientious objectors, then, became a victim of the Cold War, as Truman broke the World War I precedent of a general amnesty. Examples abound to show that Truman was clearly out of step in the world context of post-World War II amnesties—

"Since V-E Day amnesties for classes of political prisoners have been declared not only in Italy, the Soviet Union and Germany, but in Brazil, Bulgaria, Greece, India, Yugoslavia, and Rumania. Last October (1945) General MacArthur effected the release of almost a million Japanese political prisoners, conscientious objectors among them."¹⁰

Also in July, 1946, Lt. Gen. Lucius Clay announced an amnesty for German political prisoners who had not been active Nazis.¹¹

II. THE AMNESTY TEXT

The text of the 1947 Christmas Pardon for Selective Service violators is an important document.¹² In 1946 Truman ordered the creation of an Amnesty Board to consider amnesty for the nation's 15,805 Selective Service violators.

⁶ Leo P. Greenl. "Public Opinion and CO's" in *New Republic*, June 18, 1945.

⁷ *New York Times*, December 25, 1947, 20:2.

⁸ Athan Theoharis, "The Rhetoric of Politics: Foreign Policy, Internal Security, and Domestic Politics in the Truman Era, 1945-1950" in Barton Bernstein, *Politics and Policies of the Truman Administration* (Chicago, 1970), p. 200.

⁹ William A. Williams, *The Tragedy of American Diplomacy*, (New York, 1962), p. 240.

¹⁰ *New York Times*, July 14, 1946, Letter from the Committee for Amnesty.

¹¹ *Ibid.*

¹² *New York Times*, December 24, 1947, p. 8. For the amnesty text see also Mulford Q. Sibley and Philip E. Jacobs, *Conscription of Conscience*, (Ithaca, 1952), pp. 501-508.

The Board was composed of former Supreme Court Justice Owen Roberts, James F. O'Neill, former police chief of Manchester, N.H. and subsequently the National Commander of the American Legion, and Willis Smith of Duke University's Board of Trustees, later to become Governor of North Carolina by defeating the liberal incumbent by means of a very racist campaign.¹³ By the appointment of such men, Truman was clearly taking a hard-line stand.

Some conclusions can be drawn from the 1947 amnesty. A non-religious violator of lower class origins had virtually no chance of being pardoned. Jehovah's Witnesses likewise had an extremely low percentage of members pardoned. Middle or upper class religious violators had an excellent chance of being pardoned; however, violators of these classes had minimal chances of being pardoned if they were philosophical or political objectors.

Each of the cases was considered individually. The work of the Board was to determine whether those draft resisters who had already served prison sentences of C.O.'s who violated regulations of the Civilian Public Service (CPS) camps and were sentenced to prison would have their full civil rights restored. In many states such people could not vote, could not belong to professions such as law, medicine, teaching, etc., and could not sit on juries. C.O.'s who successfully completed alternative service did not lose their civil rights. In each case the pertinent individual information was:

"* * * family history, school and work records, prior criminal records, religious affiliations and practices, Selective Service history, nature and circumstances of offenses, punishment imposed, time actually served in confinement, custodial records, probation reports and conduct in society after release. In addition, the Board had in most cases psychiatric reports and one or more voluntary statements by the offender concerning the circumstances of the offense."¹²

The 626 violators still in prisons and numerous men in mental hospitals at the time were not considered by the board.

The Board broke down the 15,805 violators into two major categories: (1) those of wilful intent to evade service and (2) those whose violation resulted from beliefs derived from religious training or other convictions. Two-thirds, or 10,090 of the violators were classified as wilful violators as opposed to those who based their action on religious beliefs. Many of the wilful violators had previous criminal records which included:

"* * * murder, rape, burglary, larceny, robbery, larceny of government property, fraudulent enlistment, conspiracy to rob, arson, violations of the narcotics law, violations of the immigration laws, counterfeiting, desertion from the United States armed forces, embezzlement, breaking and entering, bigamy, drinking benzadrine to deceive medical examiners, felonious assault, violations of the National Motor Vehicle Theft Act, extortion, blackmail, impersonation, insurance frauds, bribery, black market operations and other offenses of equally serious nature; men who were seeking to escape detection from other crimes committed; fugitives from justice; wife deserters; and others who had ulterior motives for escaping the draft."¹²

These 10,000 wilful violators the Board concluded were not fit to have their civil rights restored and were not recommended for pardon.

The second class of violators classified as conscientious objectors included "those who refused to comply with the law because of their religious training, or their religious, political, or sociological beliefs." The text goes on to emphasize that only 1,000 "asserted conscientious convictions as the basis of their action." This figure does not include the 4,300 Jehovah's Witnesses who comprised a separate category and will be discussed later. The Board recommended for pardon those C.O.'s who based their action upon religious convictions but did not recommend those C.O.'s whose objection was founded on other secular beliefs:

"These were men who asserted no religious training or belief but founded their objections on intellectual, political or sociological convictions resulting from the individual's reasoning and personal economic or political philosophy. We have not felt justified in recommending those who thus set themselves up as wiser and more competent than society to determine their duty to come to the defense of the nation.

¹³ Lawrence Wittner, *Rebels Against War: The American Peace Movement, 1914-1960*, (New York, 1969), p. 162.

"Some of those who asserted conscientious objections were found to have been moved in fact by fear, the desire to evade military service, or the wish to remain as long as possible in highly paid employment".¹²

There was no statistical breakdown documenting how many of the 1,000 C.O.'s were non-religious and not pardoned and how many were religiously motivated C.O.'s.

About 12,000 of the men classified by the Selective Service System as C.O.'s opted for alternative service in the Civilian Service Camps instead of being inducted into the military as noncombatants. Some of these C.O.'s either refused to report to CPS or deserted after serving for a period of time. Others refused to comply with camp regulations in protest of unjust practices. Often the C.O.'s work was make-shift and many were denied "permission to take up special projects in hospitals or social welfare which urgently needed personnel. Often little notice was taken in job assignments of a man's specialist skills."¹⁴ Hunger strikes and work sit-ins by C.O.'s protested such conditions as well as the frequent practice of racial discrimination in CPS policies. Such men were usually convicted for their violation of Selective Service laws and were not recommended for amnesty:

"*** Most of them simply asserted their superiority to the law and determined to follow their own wish and defy the law. We think that this attitude should not be condoned, and we have refrained from recommending such persons for favorable consideration, unless there were extenuating circumstances."¹²

Many CPS camps were operated by the Selective Service System and were for the most part run on a military discipline basis.¹⁵ C.O.'s did not receive pay for their work and were denied the government's normal dependent's allotments and workmen's compensation. The conditions were, clearly, not favorable.

In the case of Jehovah's witnesses, confusion and bitterness prevailed. They felt that they should be accorded ministerial status and exempted entirely from military and CPS duty. They were usually granted C.O. status, but most refused to fulfill alternative service requirements. Consequently, they were convicted for Selective Service violations and sent to prison. Only those who devoted their full energies to "witnessing" were granted ministerial exemption:

"While few of those violators had theretofore been violators of the law, we cannot condone their selective service offense, nor recommend them for pardons. To do so would be to sanction an assertion by a citizen that he is above the law; that he makes his own law; and that he refused to yield his opinion to that of organized society on the question of his country's need for service."¹²

On the average Witnesses served 4-year sentences as opposed to the average 3-year sentences handed down to other objectors, both sentences being a much higher average "than occurred with violators of narcotics or white-slave laws and much higher, too, than was the case with objectors in Great Britain."¹⁶

III. MIDDLE-CLASS BIAS/LOWER-CLASS VIOLATORS

If one includes the Jehovah's Witnesses in the category of C.O.'s, then there was a total of 5,500 C.O.'s, or about 25% of the total of the 15,805 Selective Service violators. If one includes only the Board's definition of C.O.'s then only 6% of the total were C.O.'s. In the "criminal" classification there were about 63% of the total, or 10,000 men. A statistical breakdown of offenders and offense for this category is not available. Moreover, there is no statistical breakdown for the number of religious or non-religious C.O.'s, and consequently we do not know how many secular C.O.'s were denied amnesty.

¹² Peter Brock, *Twentieth Century Pacifism*, (New York, 1970), p. 200.

¹³ Brock, quoted on p. 193, taken from Sibley and Jacobs. Although Selective Service was not always able to live up to the principles of the following statement, it enunciated their mentality regarding CPS:

From the time an assignee reports to camp until he is finally released he is under the control of the Director of Selective Service. He ceases to be a free agent and is accountable for all of his time, in camp and out, 24 hours a day. His movements, actions, and conduct are subject to control and regulation. He ceases to have certain right and is granted privileges instead. These privileges can be restricted or withdrawn without his consent as punishment, during emergency or as a matter of policy. He may be told when and how to work, what to wear and where to sleep—he may be moved from place to place and from job to job, even to foreign countries, for the convenience of the government regardless of his personal feelings or desires.

¹⁶ Brock, p. 200.

The lack of complete statistical breakdowns notwithstanding, a preliminary analysis of the amnesty can be forwarded. The largest single category of draft violators was that of men with previous criminal records. "In perhaps one-half of the cases considered," the Board concluded, "the files reflected a prior record of one or more *serious criminal offenses*" (emphasis added).

Indeed, how serious a crime is "drinking benzedrine to deceive medical examiners"? How general are such classifications as "men who were seeking to escape detection for crimes committed", "fugitives from justice", and "others who had ulterior motives for escaping the draft"? No distinction is made between petty and grand larceny. This type of probing seriously questions the entire validity of the "serious criminal offender" category unless minor crimes included only a small fraction of the 10,000 men in question. In the postwar amnesty campaign civil liberty groups, however, raised an even more fundamental objection to the manner in which the Board handled this category:

"The problem of amnesty was concerned with violations of the Selective Service Law; if a man at some time in the past committed a rape, that was a different question altogether" and should be treated as such. Furthermore, "amnesty was pardon and restoration of rights to whole groups of offenders suffering because of a common offense. The only true amnesty would be a collective pardon to all those who for what ever reason had violated the Selective Service Act."¹⁷

Another very large group of violators for whom amnesty was not forthcoming was the Jehovah's Witnesses: they comprised 4,390 men or 29% of the total number of violators. Witnesses were, for the most part, from low income and rural backgrounds.¹⁸ The Witnesses' background takes on added importance when considered against the backdrop of the recognition that the vast majority of the Board's largest category, the "serious criminals", was probably also from a lower income group. In fact, when the sum of the two groups is computed it equals nearly 92% of the total number¹⁹ of violators. Such an incredibly high percentage is quite a good indicator of the major intention of the Board. That is, the amnesty was quite clearly based upon class lines. Since only 9% of the total number of violators was pardoned and a number of these men fell into miscellaneous categories such as those who violated the Selective Service Act out of "ignorance, illiteracy, honest misunderstanding or carelessness not rising to the level of criminal negligence,"²⁰ it is quite reasonable to assume that a good majority of those pardoned were of middle or upper class backgrounds. Prison officials themselves admitted as much in discussing the "respectability" of their C.O. prisoners. "As the Bureau of Prisons itself recognized many members of this group (non-Witness objectors) come from respectable families and communities unaccustomed to the restrictions of prison life or the associations that go with it."²⁰ The only category in which the vast majority of men was pardoned was the religious conscientious objector, whose exemption to combatant military service was provided for by the Selective Service Act of 1940.

The major conclusions which can be drawn from a preliminary analysis of the 1947 amnesty are: If one were lower class and not a religious objector, other than a Jehovah's Witness, one's chances of amnesty were quite minimal. If one were middle or upper class and a religious objector, the probability of being pardoned was maximal. If, however, a middle or upper class person were a philosophical or political objector, the chances of amnesty were nil.

IV. IMPLICATIONS FOR THE 1970'S

The term "repatriation" is preferred by many war resisters rather than "amnesty" since the latter by definition means a pardon for a legal offense. The situation of the resister is far more complex since he was placed in the position of transgressing a law no matter what he did. On the one hand, if he fought in Indochina he would be complicit in America's violation of the Geneva Accords (1954), while on the other hand, if he chose to uphold the international law he would be in violation of U.S. laws. The same applied to the daily acts of war crimes in Indochina in which he would be ordered to partici-

¹⁷ Sibley and Jacobs, p. 398.

¹⁸ Brock, pp. 34, 164.

¹⁹ About 63% were "serious criminals" and about 29% were Jehovah's Witnesses.

²⁰ Sibley and Jacobs, p. 359, see also Witmer, pp. 47-40.

pate or face military discipline. In the eyes of the resister, the human consequence of the "crime" he committed, willy nilly, pales before those he was asked to commit by the law of his country.

Amnesty-reparation in the 1970's differs in several important ways from the 1947 Truman amnesty. World War II amnesty did not include military personnel, whereas deserters comprise a very large and integral segment of resistance today. It is quite obvious that deserters must be included in a Vietnam amnesty. Another difference is that in 1947 only those who had completed their prison sentences were considered for pardon. In 1971 there are still 500 war resisters in Federal prisons; they must be included in any acceptable amnesty.

In 1947 violators who had fled the country were not considered, but in the 1970's large numbers of Canada—in Canada alone there are upwards of 100,000 resisters. A pardon excluding exiles would be a hoax. Furthermore, there are large numbers of resisters whose cases are still pending in the courts, thousands of military personnel are in stockades, and untold thousands have been discharged less than honorably.²¹ A discharge less than honorable can be a crippling handicap in many employment fields.

In considering how rigidly the 1947 guidelines are to be followed, it must be forgotten that as wars go, World War II was relatively popular,²² while the war in Indochina is not popular and quite justifiably so. Another difference is that the number of individuals concerned is much greater—perhaps as high as 200,000—in the 1970's. In World War II most resistance was predicated upon either religious or philosophical pacifism which included objection to all wars rather than political dissent or objection to a particular war as in the case of Vietnam. Although the 1947 amnesty excluded non-religious objectors, its middle class biases were predominant. It seems likely, consequently, that a 1970's pardon will also be skewed toward middle class values. This being the case it would be likely that some provisions for middle class sons whose objection was grounded on non-religious or selective objection principles will be made. This view is given added credence by the Vatican's Pontifical Commission on Justice and Peace's recent statement in support of men who refuse to fight in Vietnam for the U.S.²³

Already a nascent but undirected amnesty movement exists. This issue seems to have surfaced over the summer. In early October, 1971, Democratic Presidential candidate, George McGovern, proposed a general amnesty for draft evaders and a case-by-case adjudication for military deserters.²⁴ Judging from past movements for amnesty, public opinion is a critical aspect:

"It is no secret that public opinion is the major determinant of governmental policy in the treatment of conscientious objectors. Norman Thomas, in his definitive account of CO's in World War I, explained that the War Department was slow in formulating policy for handling these men because 'it was afraid of public clamor if it did the unpopular thing.'"²⁵

²¹ *New York Times*, October 24, 1971, IV, p. 3. "Some 500 draft resisters are in Federal prisons; another 3,000 have served sentences for that crime. In military stockades, 5,000 are serving sentences committed in Vietnam, another 4,500 are waiting trial and thousands more have been less than honorably discharged from the services."

²² In the popular mythology World War II has been seen as a "humanitarian" war, one in which America's participation was unquestioned. "Would you have participated in World War II?" is a crucial question posed by Selective Service in judging a potential CO's sincerity. Recent scholarship has begun to reveal the proportions of the humanitarian motivations of the American war effort: Strangely enough, despite the revelations of Hitler's wholesale horrors, most Americans hated the Japanese far more than the Germans. Asked which of the two countries they thought the United States could 'get along with better after the war,' Americans were nearly unanimous: 92 per cent chose Germany and only 8 per cent Japan. Racial epithets were particularly popular with the American people, who after described the Japanese as 'rats' and 'monkey faces.' (pp. 104-105) Also, the American portrayed by Joseph Heller's *Catch-22*—22, rather than the humanitarian defense of European Jewry and Nazi imperial aggression, seems to have been dominant. "Actually nobody is fighting for any ideal at all," exclaimed a soldier in the South Pacific. "They're fighting for their lives and to get this damn mess over with so they can go back home and forget about the rest of the world." In March, 1942, a majority of Americans polled admitted having no 'clear ideas of what the war is all about.' Two years later, after exposure to the bulk of the nation's wartime 'information,' over 40 percent of a national sample still maintained this position." (p. 120). Lawrence Wittner, *Rebels Against War*.

²³ *London Globe and Mail*, October 21, 1971. "The 64-point message called on the synod (the World Council of Bishops) to support those who 'refuse to participate in certain wars or certain acts of war, such as the bombardment of civilian populations.' Although neither clause mentioned the United States by name, its intent was clear."

²⁴ *New York Times*, October 3, 1971, p. 60.

²⁵ *Los Angeles Times*.

However, before the public can form a considered opinion on amnesty-reparation, the issue must be presented in clear-cut terms.

The problem with a position such as McGovern's is that it obscures the fundamental issue in question—conscionable objection to participation in the American military effort in S.E. Asia. **WHETHER AN INDIVIDUAL IS A CIVILIAN DRAFT DROGGER OR A MILITARY DESERTER, THE ISSUE REMAINS THE SAME.** Any individual regardless of social class, civilian or military status, with a case pending in the courts, in prison or the stockade, living underground in the states, or living outside the U.S. should be repatriated and have his full civil rights restored unconditionally. To do otherwise is as unjust as the war itself.

7. DORRIS, JONATHAN T., "TREATMENT OF CONFEDERATES BY LINCOLN AND JOHNSON" (PIS. I-III)

[Reprinted from *Lincoln Herald*, 1955-60]

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EDITOR'S NOTE: Dr. J. T. Dorris, Professor Emeritus of History at Eastern Kentucky State College, delivered this paper at Lincoln Memorial University on April 1, 1959. His address was part of LMU's program to honor Abraham Lincoln during the sesquicentennial of his birth. If sources are sought for this article, one should consult Dr. Dorris's book, *Pardon and Amnesty under Lincoln and Johnson* (Chapel Hill: Univ. of North Carolina Press, 1955).

It should always be taken for granted that any government will undertake to punish its citizens who violate its laws. Sometimes opposition to government takes the form of efforts to overthrow the existing government or to establish the independence of a division of a country. This opposition is the most serious, and drastic measure are usually taken to defeat the enemy and of necessity punish the supporters of the rebellion. The Civil War was such a conflict, and the Confederates who fought for independence were subject to such punishment as the government of the United States chose to inflict on them.

As early as 1790 Congress fixed the penalty of death on persons convicted of treason. This law remained unmodified until the Civil War. During that conflict not every offense could be regarded as treason. Consequently the penalty of death was too severe to apply in many cases of offenses against the government. Congress enacted a law on July 31, 1861, therefore, providing milder penalties for persons found guilty of supporting the Confederacy. Fines of not less than \$500 and not more than \$5,000, and imprisonment for not more than six years, or by both such fine and imprisonment, might be imposed.

Other laws enacted a few days later provided that "property used for insurrectionary purposes" was liable to confiscation; that any person using slave labor in supporting the Confederacy "shall forfeit the claim to such labor"; and that anyone found guilty of "recruiting soldiers and sailors to serve against the United States" shall be punished.

Some people believed these laws too lenient and regarded the Confederates as traitors who should suffer the death penalty. Senator Lyman Trumbull of Illinois, for example, declared: "If an individual should be convicted of treason against this government, I would execute him. . . . I do not believe that this is the time to mitigate the punishment for treason." The desire for more severe punishment of Confederates caused Congress on July 17, 1862, to enact such a law. Its first section provided that every person convicted of treason shall suffer death, "or at the discretion of the court, he shall be imprisoned for not less than five years, and fined not less than \$5,000."

The next section of the law recognized offenses somewhat less in degree than treason. Imprisonment for not more than ten years, or punishment by fine not exceeding \$10,000 might be inflicted. The slaves of convicted offenders were to be liberated, and both fines and imprisonment could be imposed, at the discretion of the court. Furthermore, persons convicted were to be disqualified forever from holding office, civil or military, state or national, in the United States. The President was also authorized to confiscate all property of those engaged in the rebellion and "to apply the same and these proceeds [of the sale] thereof for the support of the army and navy of the United States."

While the bill for this law was under consideration, Lincoln expressed his dissatisfaction with its severity. Thereupon Congress passed a joint resolution

providing that the act should not "be so construed as to work a forfeiture of the real estate of an offender beyond his natural life." In this manner the constitutional guarantee against injury by a Bill of Attainder was recognized in the measure. For several years after the war, therefore, many Southerners recovered their property or the proceeds of the sale thereof.

The clemency provided in the thirteenth section of this confiscation act, as the law of July 17, 1862, was called, deserves noting. It authorized the President to pardon, by proclamation, any participants in the existing rebellion, with such exceptions and at such time and on such conditions as he might think advisable.

The President already had this power under the Constitution; but its inclusion in the punitive measure informed those engaged in the rebellion of the possibility of their returning to their former allegiance to the Union without being punished. Both Lincoln and his successor, Andrew Johnson, used this power in dealing with the Confederates. There were other laws enacted later that applied to Confederates, but the measures cited are sufficient to indicate the extent to which Lincoln's (and later Johnson's) administration might go in dealing with individuals who supported the Confederacy.

There are two aspects to consider in Lincoln's administration of the foregoing laws. The first is their application before Lincoln proclaimed, on December 8, 1863, a definite plan of amnesty as the basis for the restoration of the Confederate States to their former relations to the government at Washington. The second aspect existed from December, 1863, until after Lincoln's death in 1865, when Johnson and Congress took over the treatment of Confederates and the restoration of the Confederate States to the Union.

These measures show the extent of the punishment to which persons engaged in the rebellion were to be subjected. Lincoln approved the laws and was committed to their enforcement. Johnson was also expected to enforce them when he became President. Nevertheless, the punitive legislation indicated the clemency that might be manifested in the treatment of the Confederates. Where indictments for treason existed, a person thus embarrassed might take the oath of allegiance to the United States and receive a pardon. He could then offer the pardon in court with a plea that the indictment be dismissed and the case dropped. This procedure seems to have been frequent in the border states.

As soon as the Confederate armies began to retreat, some persons who had supported the Confederacy began showing signs of wanting to renew their loyalty to the Union. There were those who had entered the Southern service under compulsion, and there were others who had willingly joined the secession movement. Many in both classes preferred liberty to being prisoners of war. Some even offered to enlist in the Union army. The noted African explorer, Henry M. Stanley, for example, fought first in the Confederate army, and, after being captured, volunteered and served in the Union navy until the end of the war.

Until an agreement for the exchange of prisoners had been made with the Confederate authorities (July 22, 1862), no general policy of granting requests to take the oath of allegiance was authorized. Many prisoners of war admitted that they "were tired of the rebellion" and desired "to return to their loyalty and to their homes." It is clearly evident, therefore, that the motive of many petitioners was to take the oath and thus evade exchange and further service in the Confederate forces. Apparently, very few of those taking the oath were permitted to enter the Federal service.

Such clemency was exercised with the expectancy of lessening the manpower of the Confederacy. Caution was observed, of course, to act at the proper time and place and in the most effective manner. Commanding officers in the field were directed in May, 1863, "that, unless especially authorized, no Confederate prisoners of war" were to be released on taking the oath of allegiance. This general restriction was not removed until the following August, and apparently few permits were granted during the interval. Early that month the commander of a prison camp in Delaware was advised that in granting requests to take the oath "it must be shown . . . that the applicant was forced into the rebel service" and had "taken advantage of the first opportunity to free himself from" that service.

These instructions provided that permission to take the oath might be granted as a favor to the petitioner's friends or relatives, if they were loyal and

vouched for his sincerity. The youth of the applicant might also be considered if it could be shown that he had been influenced by vicious companions, and that his Union friends guaranteed his future conduct. Other restrictions and limitations on administering the oath were ordered on August 17, and in October, 1863, practically all applications to take the oath were denied. The reason for such denials was the many Union prisoners for whose exchange provision should be made.

A general amnesty, or pardon, of Confederates was suggested in the punitive law of July 1862. That conditions warranted such leniency had been expressed as early as June, 1862, by General Benjamin F. Butler at New Orleans. Lincoln waited, however, until he delivered his annual message to Congress on December 8, 1863, to proclaim an amnesty and a program of reconstruction. His proclamation accompanying his message to Congress, therefore, was of a dual character. It offered pardon, with certain exceptions, to persons engaged in the rebellion, and it also outlined a plan by which the seceded states could be restored to the Union.

A full pardon restored all property rights, "except as to slaves and in the property cases where rights of third persons" had intervened, that is, property that had been confiscated and sold could not be restored. The recipients of pardon were required to take an oath to "support, protect, and defend the Constitution of the United States and the Union of the States. . . ." They also swore to support all laws of Congress and proclamations of the President with reference to slaves.

There were six classes of persons whom the proclamation excepted. They were ". . . all who are or shall have been civil or diplomatic officers or agents of the so-called Confederate government; all who have left judicial station under the United States to aid the rebellion; all who are or shall have been military or naval officers of said so-called Confederate government above the rank of colonel in the army or of lieutenant in the navy; all who left seats in the United States Congress to aid the rebellion; all who resigned commissions in the army or navy . . . and afterwards aided the rebellion; and all who have engaged in any way in treating colored persons, or white persons in charge of such, otherwise than lawfully as prisoner of war. . . ."

It was to be expected that Lincoln would expect the leaders of the Confederacy from the benefits of his amnesty. According to his way of thinking, they were responsible for these rebellion and surely deserved special consideration which might result in some degrees of punishment. This was a logical conclusion and one which his successor came to make. Nevertheless, as in the case of offenders of all kinds, a Southern leader might make special application for, and receive, an individual pardon, though the proclamation did not so specify.

The President's proclamation also offered a plan of restoration to the seceded states. The plan provided that when, in any state, "a number of persons, not less than one-tenth in number of the votes cast in such state at the presidential election" of 1860, had taken the amnesty oath and qualified as voters under the election laws existing prior to the state's act of secession, such persons and no others might reestablish a loyal state government.

Amnesty and reconstruction were to be closely associated. The oath became the test of loyalty to the Union and of fitness to participate in the reorganization program. At the same time, those who thus qualified were pardoned for any part which they had taken in the rebellion and their offenses were placed in oblivion. Moreover, whenever the amnestied persons of a given state equaled one-tenth of the number of votes cast in that state in the last presidential election, they might form a loyal government.

It should be noted that the President's proclamation was expected to allay the fears of those engaged in the rebellion who believed they would be severely punished if they failed in their effort at independence. To them it had appeared that abject subjugation was certain if their cause was lost. This fear was indeed justifiable. The punitive measures of Congress and the threatening expressions of Northern radicals naturally aroused such apprehension.

Furthermore, the Confederate leaders and press contrived to keep these fears before the Southern people in order to stimulate their utmost resistance and to counter-act any development of sentiment for peace without independence. General Lee's proclamation, as the army of the Potomac crossed the Rapidan in November, 1863, is an example of such efforts. In part, it ran as follows: ". . . a cruel enemy seeks to reduce our fathers and our mothers, our

wives and our children, to abject slavery, to strip them from their homes. Upon you these helpless ones rely to avert these terrible calamities and to secure to them the blessings of liberty and safety."

The President's proffer of pardon and his simple plan of reconstruction were expected to combat such sentiment. Surely, it was believed, the Confederate soldier or civilian, if the proclamation were brought to his notice, would be impelled to look with favor upon the proposition and be less inclined to expect disaster to follow Northern success. This expectation, however, was not realized to any considerable degree, at least immediately.

There were members of Congress who very soon came to regard that part of the proclamation having to do with reconstruction as entirely unsatisfactory. They believed that ten percent was too small a basis for the organization of a loyal state government. The opposition secured the passage of a bill by both Houses, early in July, 1864, which the President received for his approval less than one hour before Congress adjourned *sine die*. This Wade-Davis Bill provided a very different plan of restoration from that offered by the Executive.

President Lincoln failed to sign this bill, and on July 8 gave his reasons for not doing so in a proclamation in which he stated that he did not want to commit himself to any definite plan of reconstruction. He gave as one reason for his pocket veto his unwillingness to discourage the loyal people in Arkansas and Louisiana, who had already installed governments in compliance with his plan. Furthermore, he also stated that he believed emancipation in an absolute and inclusive form should be provided by constitutional amendment.

As in the case of all new measures of an administrative or legislative character, questions of interpretation and application arose as soon as persons began seeking advantage of the President's offer of clemency. Before whom must the oath be taken? Are those who have remained steadfastly loyal to the Union obliged to take the oath before voting? Does the proffer of amnesty apply to persons already indicted or convicted? Does a person obtaining a pardon regain possession of his property when it has already been confiscated? These were the most important questions the authorities were called upon to answer.

Andrew Johnson, military governor of Tennessee, soon desired to have the first two questions answered. He was informed that the "oath might be administered by the military governor, the military commander of the department, and by all other persons designated by them for that purpose." The answer to the second question was of greater moment. Those who remained loyal to the Union protested vigorously against taking the oath and being classed with secessionists. Such protests, however, were in vain, for Lincoln said: "Loyal as well as disloyal shall take the oath because it does not hurt them, clears all questions as to right to vote, and swells the aggregate number who take it which is an important object."

It was quite natural that loyal Tennesseans should feel highly indignant on being required to take the oath of allegiance with those who had been notoriously disloyal. There were also those in Tennessee who believed that one-tenth was too small a number to be permitted to restore the state to its former condition. Many of these objectors also believed that the President should have excepted many others from his amnesty. Such exceptions would have lessened the likelihood of amnestied Confederates getting control of the government in a state where there was a considerable loyal population, as there was in Tennessee.

Governor Johnson was of the opinion that the President's oath was too liberal as a test for permission to participate in the reorganization of Tennessee. In preparation for the first elections, he announced a more stringent oath for the privilege of participation therein. The question immediately arose as to whose amnesty oath should be administered. Some objected to the President's oath as a test not required by the laws of Tennessee. But the Governor's test was still more objectionable because it required a declaration of one's "desires." Nevertheless, when Lincoln was asked to set aside Johnson's proclamation, he refused, saying that there was "no conflict" between the two oaths and that the use of Johnson's plan would avoid "conflict and confusion."

Apparently, Johnson was not at all satisfied with the operation of the President's amnesty measure in his state. He believed that it did not cause those for whom it was especially intended to manifest the proper respect for the au-

thority from which it came. He told Lincoln "that Tennessee should be made an exception," and that those who deserved pardon should apply "directly to the President." This procedure, he believed, would cause them to "feel under a much greater obligation to the Government."

Lincoln apparently saw no reason for such an exception and allowed his own plan to operate in Tennessee. Nevertheless, when the time came to choose presidential electors in 1864, Johnson, encouraged by a convention in which he had been the dominant personality, proclaimed another oath to be taken by those desiring to vote in this election. It differed from his first by requiring a greater expression of submission on the part of those who were not exactly in accord with the strong Unionists.

Lincoln could not be induced to interfere with the Governor's procedure, justifying his refusal on constitutional grounds. He also suggested the impossibility of conducting an election in Tennessee "in strict accordance with the old code of the state;" and for that reason he permitted Johnson to carry out his plan, reminding his petitioners that only Congress could determine whether the electors chosen in their state would be "entitled to be counted."

As one might expect, persons under Federal indictment or conviction began at once to seek pardon under the President's amnesty proclamation. On December 15, (1863) Lincoln informed a judge in San Francisco that the amnesty oath was "not for those who may be constrained to take it in order to escape actual imprisonment or punishment." A little later (December 31), when the case of a man under conviction to be hanged as a spy and for violating his oath of allegiance was brought to his attention, he decided that his proffer of amnesty did "not extend to prisoners of war, or to persons suffering punishment under the sentence of military courts, or on trial or under charge for military offenses." But it has never been in the province of the Chief Executive to pass upon the legality or constitutionality of his acts. The President's interpretation of the application of his proclamation, therefore, did not stand the test of the courts.

The foregoing and many other questions involving the administration of the proclamation of amnesty indicate that it was not satisfactory even to Lincoln. It was regarded as being too liberal in its application to "insurgent enemies" who were being prosecuted, or who were already convicted and in confinement. It also failed to state who might administer the oath, and what provision was to be made for the certification and disposition of the oath after it had been administered. Accordingly, Lincoln issued an explanatory proclamation on March 26, 1864, defining the application and administration of his former measure. In this manner his act had the force of law, which his instructions of the previous December did not have.

The second proclamation stated that the first applied "only to those persons who being yet at large and free from arrest, confinement, or duress, shall voluntarily come forward and take the said oath with the purpose of restoring peace and establishing the national authority." Thus a seventh exception was added to the earlier proclamation. Those in the excluded classes, however, might "apply to the President for clemency, like all other offenders," and they would "receive due consideration." This proclamation supplemented the previous one and, in reality, was defined by the courts as a part of the first.

But was the President's proffer of amnesty accepted by any considerable number of persons in both the military and civil service of the Confederacy? Not as many, it might be said, as its author expected. Lincoln estimated the response to his proclamation of amnesty in his last annual message to Congress (December, 1864). He stated therein that "during the year many [had] availed themselves of the general provision, and that many more would have [done so], only that the signs of bad faith in some [had] led to such precautionary measures as rendered the practical process less easy and certain." He also said that he had granted "special pardons . . . to individuals of the expected classes," and that "no voluntary application" had "been denied."

This statement was too general and perhaps too early to satisfy the desire for a more definite conclusion as to the results of the policy of clemency in operation during the war. Nevertheless, as Lincoln approached the close of his rather long message, he focused attention on the cardinal virtue of his policy in dealing with persons in rebellion against the Government. "Thus practically," he said, "the [pardon] door has been for a full year open to all except

such as were not in condition to make free choice: that is, such as were in custody or under constraint. It is still so open to all." And then he gave an ominous warning: "But the time may come, probably will come, when public duty shall demand that it be closed and that in lieu more rigorous measures than heretofore shall be adopted."

Finally, it might be said that the President's proclamation of pardon and amnesty undoubtedly weakened the loyalty of many thousands of minor supporters of the Confederacy, both civil and military. Especially was it welcomed by those who saw in its acceptance a guarantee against molestation by the Federal authorities. Its merit as a test of fitness for participation in the restoration of a state justified its application; and, in this respect, Tennessee, Arkansas, and Louisiana were considerably affected. This was manifested in their progress toward restoration according to the plan of amnesty.

Nevertheless, the proclamation's greatest merit was the manifestation of a very liberal policy of clemency, which the Chief Executive proposed to apply in dealing with those in rebellion against the government—a generous offer, which remained unmodified when death overtook its author. Moreover, it was this constitutional application of executive clemency which was likely to function after the war in mitigating the severe punitive laws that many avenging Northerners desired to have enforced. At least, this was the liberal interpretation that might be given to Lincoln's attitude toward the Confederates.

The questions in every Unionist's mind as the end of the war approached, were what plan of restoration would prove the most satisfactory? And what punishment, if any, should be inflicted on the leaders of the Confederacy? The President's ten-percent plan appeared to be his answer to the first question, and his proffer of pardon and amnesty, his answer to the second. He had made it plain, however, that this policy was subject to modification.

A little more than four months after this message, Abraham Lincoln was dead and the war practically over. Did his heart harden toward the Confederates during the interval? Did the time come when public duty demanded that "more rigorous measures . . . be adopted?" Apparently it did not. As far as Lincoln's subsequent acts were concerned, the door to his system of clemency remained open to the time of his death. The report of the Hampton Roads Conference (February 1865) shows that he still considered general amnesty and restoration on practically the same plan as that in effect. As to the question of enforcing the confiscation and other punitive acts of Congress, he said their enforcement was left entirely to him; but he gave assurance that he would "exercise the power of the executive with the utmost liberality."

General Sherman states in his *Memoirs* that he asked Lincoln at City Point, on March 27-28, 1865: "What was to be done with the rebel armies when defeated? And what was to be done with the political leaders? . . . Should we allow them to escape? . . ." Sherman says that "All he wanted of us was to defeat the opposing armies, and to get the men composing the Confederate armies back to their homes at work on their farms and in their shops. As to Jefferson Davis, he was hardly at liberty to speak his mind fully, but estimated that he ought to clear out 'Escape the country,' only it would not do for him to say so openly."

Grant states in his *Memoirs* that he believed "Mr. Lincoln wanted Mr. Davis to escape because he did not wish to deal with the manner of his punishment. He knew there would be people clamoring for the punishment of the ex-Confederate for high treason. He thought enough blood had been spilled to atone for our wickedness as a nation."

Senator Charles Sumner was equally of the opinion that Lincoln could not bring himself to the point of punishing the leaders of the Confederacy. He said that he "was with him for four days shortly before his death . . . and during all this period he was not for a moment tempted into any remark indicating any desire to punish even Jefferson Davis. In refutation to a statement that Davis should be hanged, Lincoln said again and again 'Judge not, that ye be not judged.'"

On February 5, 1865, Lincoln prepared a message to Congress recommending a joint resolution providing that \$400,000,000 be given the slave states on two conditions. First, half the amount suggested was to be paid if "all resistance to the national authority shall be abandoned and cease on or before the first day of April next." Second, the remainder was "To be paid only upon the

Thirteenth Amendment of the National Constitution recently proposed by Congress becoming valid law, on or before the first day of July next." If Congress acted favorably upon his suggestion by passing the "resolution" and the states complied with its terms, the President would proclaim that "war will cease and armies be reduced to a basis of peace;" that "all political offenses will be pardoned;" that "all property, except slaves, liable to confiscation or forfeiture, will be released therefrom;" and that "liberality will be recommended to Congress upon all points not lying within executive control."

Lincoln submitted this measure to his cabinet, whose disapproval was unanimous, and consequently he never sent the message to Congress. Its provisions, however, indicate the very great clemency which their author entertained, at the time, in trying to arrive at a solution of the problem confronting the nation at the close of the war. The wise President believed that both the North and South were responsible for slavery, and, according to his way of thinking, the North should have been willing to tax itself to compensate the South for the loss of property in slaves. It was far better, he believed, to spend such a sum in conciliation and in rendering justice than in any further effusion of blood. But his will was not to be done. The day of compensated emancipation was gone forever, and Lincoln's effort to "dissolve sectional hatred and plant fraternal good will" was in vain.

Lincoln closed his last public address (April 11, 1865) with an argument in favor of the plan of restoration then in vogue. He indicated that he was just as lenient as ever, as far as his attitude toward the political problem of reconstruction was concerned. In the last two sentences of this same speech he intimated that he was contemplating "some new announcement to the people of the South." "I am considering," he said, "and shall not fail to act when satisfied that action will be proper."

At Lincoln's last cabinet meeting a plan of reconstruction was discussed and left for subsequent consideration. Welles says that the President requested the members "to deliberate and carefully consider the proposition. He remarked that this was the great question now before us, and [that] we must soon begin to act." The Secretary of the Navy stated at another time, in referring to this cabinet session, that Lincoln "was particularly desirous to avoid the shedding of blood, or any vindictiveness of punishment. He gave plain notice that morning that he would have none of it. No one need expect that he would take any part in hanging or killing these men, even the worst of them. 'Frighten them out of the country, open the gates, let down the bars, scare them off,' said he, throwing up his hands as if scaring sheep. 'Enough lives have been sacrificed; we must extinguish our resentments if we expect harmony and union.'"

These are the last recorded utterances of Abraham Lincoln on the subject of punishing the leaders of the Confederacy. Had he lived he would have dealt with Davis, Lee, Toombs, *et al.* in the most merciful manner consistent with the exigencies of the time. A general amnesty with fewer exceptions than in his proclamation of December, 1863, would probably have been granted (indeed, he might have proclaimed a universal amnesty); confiscations would have stopped; and the leaders of the Confederacy would most likely have gone into voluntary exile for a time (unless pardoned), after which they would have returned, taken the oath of allegiance, and resumed their former privileges as citizens of the United States. The manner of restoring the states to their former political position in the Union would have been little different from that announced in his proclamation of December, 1863. It might have been even more generous.

The murmurings against Lincoln's policy of leniency were silenced in the general rejoicings over Lee's surrender to Grant (April 9, 1865). At that time sentiment was very strong in favor of dealing very liberally with the South. The President's policy had certainly given the Confederates no cause for fear. They were expecting his program of mercy, always so evident, to continue to function. As Confederate General John B. Gordon so aptly states in his *Reminiscences*, the Government would have dealt generously with the South, "because Abraham Lincoln was at its head."

The magnitude of the opposition to Lincoln's policy in dealing with the Confederates now became evident. The death of the President was regarded by many as a godsend to the country. Declarations were made all over the North that too much mercy had been shown the Southerners. *The New York Herald*

for April 16, while deploring Lincoln's cruel death, predicted that the policy of the new President in dealing with the South "would be more tinctured with the inflexible justice of Andrew Jackson than with the prevailing tenderness of Abraham Lincoln."

President Johnson received letters from many sources saying, in substance, that Lincoln's death was an act of providence; that his work of saving the Union was finished; and that a man of stronger parts was needed to punish those responsible for the rebellion. A man in Ohio wrote: "We believe that Abraham Lincoln's work was done; he was not the man to administer justice, he was always too merciful and kind." Another in Massachusetts said: "When news came of the assassination of President Lincoln, and my family were in tears around me, I rallied them, as myself, by the thought, providence has given the work of justice into the hands of Vice-President Andrew Johnson to be better done than it would have been by good President Lincoln."

Such sentiment was expressed to Johnson by Samuel McFarland, a prominent Democrat and politician of Pennsylvania, who had been considered as a candidate for the vice presidency in 1856. McFarland had written a letter to Lincoln, but had not mailed it when the assassination was announced. He enclosed this letter with one to Johnson about a month later. In his letter to Lincoln he advised "unlimited confiscation and disfranchisement" in dealing with the South. "According to the rules of civilized warfare," he stated, "the conquering party has a right to demand of the conquered, 'indemnity for the past and security for the future.'" As to the leaders of the Confederacy, he declared that they had no right "under the Constitution except to be hung or banished."

McFarland told Johnson in his second letter that he was free to admit he was not so concerned about the subject of reconstruction as he had been in Lincoln's lifetime. He was sure that Johnson understood the Southerners and the spirit of the rebellion much better than Lincoln, and declared his faith in Johnson's ability "to close up the infernal rebellion . . . in the right way." McFarland then denounced the leaders of the rebellion in the strongest, possible, polite language. He would have them "roam as vagabonds upon the earth . . . as did Cain, who imagined everyone who saw him would slay him. Let them feel," he said, "that they have no rights which white men or black men are bound to respect. . . ."

In life and in death, therefore, Abraham Lincoln was regarded by many as inherently too disposed to leniency to deal justly with those who sought to destroy the Union. Now that he was gone and his place taken by one who had shown every indication of being far less lenient, the punishment of the Southerners seemed assured.

The day after Lincoln's death a delegation of Radicals in Congress called to pay their respects to the new President. Evidently they were well pleased with the change of Chief Executives, for their spokesman, Senator Benjamin Wade, said: "Johnson, we have faith in you. By the gods, there will be no trouble now in running the government!" This was strong language, indeed, but, under the circumstances, it was to be expected of Benjamin Wade in addressing Andrew Johnson at that time. Wade had bitterly opposed Lincoln's amnesty policy and plan of reconstruction. He had fostered the Wade-Davis bill and had joined Henry Winter Davis in the famous "Wade-Davis Manifesto" of August 5, 1864, a severe denunciation of Lincoln for refusing to sign the Wade-Davis bill and for persisting in applying the lenient policy of reconstruction announced in his proclamation of December 8, 1863. Consequently, he now exulted in the apparent assurance that a punitive or retributive policy would soon be administered in dealing with persons who had supported the Confederacy.

Indeed, from the earliest days of secession Johnson had evinced a desire to have at least the leaders of the rebellion punished. Notwithstanding Tennessee's act of secession, he had answered the Southern senators' farewell speeches in the Senate by declaring: "Were I the President . . . I would do as Thomas Jefferson did in 1806 with Aaron Burr. I would have them arrested and tried for treason; and if convicted, by the Eternal God, I would see that they suffered the penalty of the law at the hands of the executioner." His stirring words had also helped to inspire and unite the North to support the Union when many Northerners of influence were passive or counseled Lincoln to let the "erring sisters" go in peace. Tennessee had disowned and persecuted

him during the early days of the war, but in 1862 this state had felt his rigorous administration as Military Governor.

On becoming President, Johnson appeared determined to apply that same rigorous policy in dealing with the leaders of the rebellion. In his brief inaugural address he uttered these ominous words: "The only assurance that I can now give of the future is reference to the past. The course which I have taken in the past in connection with this rebellion must be regarded as a guaranty of the future." To Wade's committee, the day after taking the oath of office, he declared: "I hold that robbery is a crime; rape is a crime; treason is a crime; and crime must be punished. Treason must be made infamous, and traitors must be impoverished." Two or three days later he assured a delegation from Illinois of his determination to teach Americans "that treason is a crime and must be punished." In other speeches during the early weeks of his administration, he made similar utterances.

President Johnson soon manifested a retributory policy in matters pertaining to the close of the war. His reaction to the Sherman-Johnson convention is a case in point. The liberality accorded the Confederates in this measure was too much for his temper. In fact, the terms were generally unacceptable to the North. This agreement which Generals W. T. Sherman and Joseph E. Johnston, made near Durham, North Carolina, on April 17, 1865, was in substance a treaty intended to be accepted by the two governments concerned.

The disintegrating Confederate government readily approved the agreement, which was to be a universal amnesty, with all rights and privileges of the Confederates restored. The last article announced that the war was to cease, and that "a general [universal] amnesty" was to be proclaimed by the President "on [the] condition of the disbandment of the Confederate Armies, the distribution of arms, and the resumption of peaceable pursuits by [the] officers and men hitherto composing such armies." The measure would have placed the late Confederate states in their former status in the Union. But to President Johnson, General Grant, and the Cabinet, the Sherman-Johnston agreement was anathema. General Grant was therefore sent to instruct Sherman to treat with Johnston of such terms as Grant had allowed Lee at Appomattox.

Supported by Admiral Porter and others, Sherman insisted later that his agreement with Johnston conformed to Lincoln's intentions expressed to him at City Point, where on March 27, the President had confided to Sherman his sentiments on reconstruction. The terms were indeed somewhat in advance of Lincoln's earlier views on reconstruction, but they were in line with the general tendency of his policy.

Another example of President Johnson's early punitive policy was manifested in the Milligan-Bowles treason case. Four men, Lamdin P. Milligan, William A. Bowles, Stephen Horsey, and Andrew Humphreys, had been convicted of treason by a military tribunal in December, 1864. Their offenses as "Sons of Liberty" were committed in Indiana, where they were also tried. Milligan, Bowles and Horsey had received death sentences, and Humphreys was to be imprisoned for life. Lincoln had been petitioned to pardon the men, but he had done nothing about the matter except to give assurance that he would pardon them after the war. Johnson, on becoming President, approved the death sentences and ordered the three men to be executed on May 19, 1865. He was influenced later (May 2) to suspend the execution of Milligan and Bowles to June 2 and to commute Horsey's punishment to life imprisonment.

The case was finally taken to the Supreme Court which declared (April 3, 1866) against the military commission that had convicted the men. Before the decision was announced (December 17, 1866), however, Johnson yielded again (April 10, 1866) to an application for clemency and ordered the sentences remitted and the men discharged from prison. By the late summer and autumn of 1865, as indicated later, he had become rather lenient in dealing with many supporters of the Confederacy.

PART II, SPRING 1869

Perhaps the greatest difference between Lincoln's lenient attitude toward punishing the Confederate leaders and Johnson's early determination to punish them was manifested in Johnson's treatment of Jefferson Davis. The assassination of Lincoln and the alleged conspiracy of Davis and others in the plot added fuel to the existing indignation in the North against the Southern peo-

ple, especially their leaders. The authorities at Washington shared this bitterness and sought to bring the President of the late Confederacy and his alleged accomplices to justice. On May 2, 1865, President Johnson, in a proclamation based on what appeared to be "evidence in the Bureau of Military Justice," charged Davis with complicity in the assassination and offered a reward of \$100,000 for his capture.

A little later (May 23) the fleeing President of the Confederacy was arrested and imprisoned in Fortress Monroe, Virginia, where he remained until admitted to bail on May 13, 1867. The reward for his capture was paid, but no indictment for murder was ever returned against him. In fact, the evidence upon which the atrocious charge was made proved to be absolutely fraudulent. Unfortunately, the ill-advised proclamation was never rescinded but remained a source of irritation to Davis and many others. Moreover, it may be said to Johnson's discredit that he never did anything to remove the defamation of Davis' character which resulted from this unfortunate act. Subsequently, he could, with good grace, have expressed his confidence in Davis' integrity and thus disavowed the shameful charge with his proclamation carried.

Former United States and Confederate Senator Clement C. Clay was also confined in Fortress Monroe and a reward of \$25,000 paid for his arrest on the assumption of his participation in the assassination. Rewards offered for the apprehension of Jacob Thompson, Beverly Tucker and others on fraudulent evidence that they had encouraged the assassination were revoked on November 24, 1865. But many other leaders of the rebellion were arrested and imprisoned soon after Johnson became President. General Robert E. Lee avoided such treatment, as did other high officers of the Southern army, by having their paroles respected. General Grant interceded for Lee when that officer was about to be arrested. Officers who were prisoners of war remained as such until paroled (General R. S. Ewell and his stepson, Major Campbell Brown, until late in July, 1865). As late as December 15, 1865, Admiral Raphael Semmes, Commander of the *Alabama*, was arrested, in spite of his parole, and imprisoned for four months in Washington.

Prominent Confederate civilians were arrested and confined for a time in Forts Pulaski, Lafayette and Warren. John A. Campbell, Alexander H. Stephen, Stephen R. Mallory, George A. Trenholm, John H. Reagan, John A. Seddon and A. G. Magrath experienced such treatment. Some civil leaders, fearing arrest and punishment, fled from the United States. John Cabell Breckinridge, Robert Toombs and Judah P. Benjamin are examples of fleeing Southerners. Toombs returned early in 1867, had a satisfactory interview with Johnson, and remained unmolested. Breckinridge never returned until March, 1869, and Benjamin remained in England where he became a prominent lawyer.

In all, some 10,000 Southerners fled to Brazil, Mexico and elsewhere after the war. Most of them returned, but a few died in exile. Governor John Milton of Florida, committed suicide on April 1, 1865. Governors Henry W. Allen of Louisiana, and Pendleton H. Murrah of Texas, died in exile. Governor John J. Pettus of Arkansas, fled to the swamps of his state, and then returned home under an assumed name and soon died.

Before stating the amnesty policy adopted by the new President. It might be well to observe that such a serious and weighty matter as dealing with the supporters of the Confederacy should have been largely determined at the outset by judicial precedent, or opinion, and international law. The belligerent character of the Confederacy had been established, as far as the highest American tribunal could determine the legal status of any organization, early in the war. The Supreme Court in December, 1862, interpreted certain acts of both the executive and legislative departments of the government as recognizing the belligerency of the Confederacy. In what are known as the *Price Cases*, the Court held that the President's proclamations of April 19 and 27, 1861, ordering the blockade of the Southern ports, and certain laws of Congress passed July 13 and August 6, 1861, were evidences of the recognition of the belligerency of the Confederacy, even though these acts were not intended as such. Furthermore the decision contained the opinion that the attitude of foreign powers had given the conflict a status of legalized warfare between two belligerents. This meant, of course, that declarations of neutrality by European powers were, in effect, recognitions of a belligerency between the United States and the *de facto* government of the Confederate States which the administrative authorities at Washington should respect.

The Court further defined the struggle as a civil war, and the Southern participants as "enemies" and not "traitors." Moreover, the law of nations was declared to contain "no such anomalous doctrine . . . that insurgents who have risen in rebellion against their sovereign, expelled his courts, established a revolutionary government, organized armies and commenced hostilities [all of which the Confederacy had clearly done], are not enemies because they are traitors; and a war levied on the Government by traitors, in order to dismember it and destroy it, is not a war because it is an "insurrection."

Thus the highest tribunal in the nation took the position very early that the organization of the Confederate States and the long war which ensued were not actually treason against the United States. There was nothing new in this opinion; for more than a century earlier the great international legalist, Emerich de Vattel, had not only described civil war in such terms as to remove the American "war between the States" from the category of treason, but he had also prescribed certain rules which the sovereign power should apply in dealing with rebellious subjects. "If they have rebelled without cause," he stated, ". . . the sovereign must even then . . . grant an amnesty to the greater number of them on the return of peace." He admonished the sovereign, however, to observe carefully "whatever promises he has made even to . . . those of his subjects who have revolted without reason or without necessity." Nevertheless, he made it clear that the sovereign "may except from the amnesty the authors of the disturbance, the leaders of the party, and may judge them according to the laws, and punish them if they are found guilty." But even here Vattel made a qualified exception which is worthy of notice. The sovereign, he said, "may follow this course especially when dealing with those disturbances which are occasioned less by popular grievances than by the designs of certain nobels, and which deserve rather the name of *rebellion* than *civil war*."

This principle, if applied to supporters of the Confederacy, would mean a nearer approach to universal amnesty than if the struggle had been of lesser significance and magnitude. In other words, if the President regarded the leaders of the Confederacy as acting without sufficient cause and as merely desiring to further their unworthy and selfish motives, he would be justified in punishing them; but if he placed the conflict on the higher plane of a civil war, he would be justified in pursuing a more lenient policy in dealing with them. Vattel made it very plain that in an effort to "split" a "Republic," the obligation upon the two parties to observe toward each other the customary laws of war is "absolute and indispensable, and the same which the natural law imposes upon all nations in contest between state and state."

If Vattel in his day (1758) clearly placed organized and material internal resistance to a sovereign power on the plane of legitimate warfare and stated that both parties should observe the recognized rules of warfare commonly applying to struggles between belligerents, it appears that such consideration might have been exercised a century later under similar circumstances. That consideration would surely have placed the supporters of the Confederacy, in the seceded states at least (including Kentucky and Missouri), beyond the pale of treason.

Therefore, in the light of international law, as also expressed later (1905-06) by Lassa F. L. Oppenheim, the Confederates were in reality belligerents and came within the scope of the rules of warfare applying to such contests. Amnesty, universal or general, should have been the recognized procedure by both belligerents at the close of the war. This would have meant that no one would have been indicted for treason. Oppenheim suggested further that a treaty of peace containing an amnesty is not out of place at the close of a civil war. It is interesting to note that a treaty similar to the Sherman-Johnston agreement containing a universal amnesty provision was made in 1902 between the British and the Boers of South Africa, who had fought for independence from Great Britain. Consequently, since the Confederate States of America were certainly a belligerent power with a *de facto* government, it is easy to deduce from the foregoing that those who had supported the Confederacy might reasonably have believed that the Federal government would deal very leniently with them.

International law is not likely to be applied by a sovereign power in dealing with its subjects who have revolted, even when the rebellion has assumed major proportions and the opposition has been recognized as a belligerent

power. Municipal law is likely to have greater weight. Such was the case immediately after the close of the American Civil War. The organic law of the United States defines certain acts, when committed by citizens of the nation, as treason, and gives Congress the power to determine the punishment therefore. According to this definition the acts of the supporters of the Confederacy could be regarded as treasonable. The punitive laws which Congress had passed in 1861 and 1862, as already shown, were intended for persons convicted of "levying war" at that time against the United States. No provision was made for any other kind of warfare, and the maximum penalty had been fixed at death. Minor sentences of confiscation of property, of disfranchisement, of imprisonment, and of heavy fines might be imposed. Furthermore, the Federal executive authorities had not accepted the principle that the Confederate States were a belligerent power with a *de facto* government (as had been expressed by the Supreme Court in the *Prize Cases*), had made no treaty with it, and had insisted rather on regarding its adherents as insurgents and liable to punishment as such.

On April 21, 1865, President Johnson formally asked his Attorney-General, James Speed, to advise him concerning the power of the President to grant pardons. He also desired to know the "construction and effect" of Lincoln's proclamations of December, 1863 and March, 1864, and whether or not another amnesty proclamation should be offered and how inclusive it should be. On May 1, Speed advised Johnson that he had the constitutional right to issue such a proclamation, and emphasize the propriety and benevolence of clemency. He also declared that Lincoln's proclamation was only a war measure intended "to suppress the insurrection and to restore the authority of the United States, and was applied with reference to those objects alone." This meant, of course, that Lincoln's pardons were valid, but that his proffer of amnesty ceased to function with the end of the war.

The Attorney-General also stressed the former President's tendency toward leniency. He quoted from his fourth annual message to Congress the entire paragraph on "general pardon and amnesty." He wanted especially to emphasize the words: "But the time may come, probably will come, when public duty shall demand that it [the 'door' of mercy] be closed and that in lieu more rigorous measures than heretofore shall be adopted." Speed concluded, therefore, that another proclamation of pardon and amnesty "covering a new past" was advisable.

Eventually the amnesty measure and its reconstruction supplement were completed, and on May 29, 1865, Johnson issued his first proclamation of pardon and amnesty. He gave as the reasons for his act the failure of many to take advantage of Lincoln's proffer of amnesty, and the fact that many others who had been "justly deprived of all claim to amnesty and pardon" under the earlier proclamations by reason of their participation in the rebellion after the date of the previous amnesty "desired to apply for and obtain amnesty and pardon." The oath required of those seeking benefit from his amnesty was briefer and less inclusive than that in Lincoln's proclamation, but its meaning implied as much.

Johnson excepted fourteen classes from the benefits of his amnesty, seven more than Lincoln excluded in his proclamations. The seven additional classes were: "All persons who have been or are absentees from the United States for the purpose of aiding the rebellion;" all Confederate military and naval officers who were educated at West Point or Annapolis; "all persons who held the pretended offices of governors of states in insurrection against the United States;" "all persons who left their homes within the jurisdiction of the United States" to aid the Confederacy; "all persons who have been engaged in the destruction of the commerce of the United States, and . . . who have made raids into the United States from Canada;" all voluntary participants in the "rebellion and the estimated value of whose taxable property is over \$20,000;" and all who had taken and subsequently violated the previous amnesty oath or the oath of allegiance to the United States.

Probably the most significant provision of the proclamation provided: "That special application may be made to the President for pardon by any person belonging to the excepted classes, and such clemency will be liberally extended as may be consistent with the facts of the case and the peace and dignity of the United States." This meant that the President could determine at will

which of the influential Southerners he would pardon and which he would refuse to favor, providing, of course, that those excepted from his general amnesty chose to make individual applications to him for clemency.

Simultaneously with his proclamation of pardon and amnesty, the President announced a plan of restoration for North Carolina. This plan appears to have been foreshadowed by Lincoln and his Cabinet at their last meeting. There was a noticeable difference, however, between it and Lincoln's measure of December, 1863. Instead of a ratio of at least one-tenth of the number of voters in 1860 being required to take the amnesty oath before proceeding further with the work of reconstruction, no percentage at all was needed. Johnson merely required the taking of his oath without any specification as to numbers necessary to participate in the program of reconstruction. It was clearly evident, however, that a satisfactory number would thus qualify.

As in Lincoln's amnesty and plan of reconstruction, a close relationship existed between Johnson's policy of clemency and his plan of reconstruction. Pardon not only restored a citizen to his former civil rights and stopped further confiscation of his property, but it also gave him political standing in his state. This political power was so desirable that the most obstinate supporter of the Confederacy could not afford to allow any sentimental scruples to restrain him from seeking a pardon even at the hands of Andrew Johnson.

To many Southerners the President's proclamation of amnesty was an encouraging proposition. Johnson's plan of reconstruction was equally heartending, especially since it continued Lincoln's policy, under which Louisiana, Arkansas, and Tennessee (and Virginia, too) were recognized as restored. The fourteen exceptions in the amnesty, of course, left many thousands disfranchised and disqualified from performing legal contracts until they obtained the President's special pardon. Moreover, the punitive laws for rebellion affected some persons in loyal as well as in the late Confederate States. Applications for clemency, therefore, came from states which had not been members of the Confederacy. Naturally, when the amnesty was clearly understood, thousands of persons began seeking the President's pardon.

Many in the excepted classes, apparently, engaged in business as if they had been pardoned, while others hesitated to act thus until they were relieved. Applications for special pardon reveal the desire of some for clemency so that they might sell property or engage in a lucrative profession or business. An unpardoned man like General Howell Cobb, for example, returned to his profession hoping that no one would disturb him. In December of 1865, Cobb, a lawyer, wrote his wife that he was doing well. In August, 1865, General Robert E. Lee accepted the presidency of Washington College, though desiring a pardon so that he could transact business in court to settle the Curtis estate on the Potomac.

It should be understood that most Confederates were pardoned outright on taking the amnesty oath. Some 200,000 such oaths are in the archives at Washington, and one record contains the names of more than 180,000 persons thus pardoned. Confederates in Johnson's fourteen excepted classes were obliged to apply directly to the President for special pardon, which he would likely grant if the governors of the states where the petitioners lived approved. This number is difficult to estimate.

There were 20,000 to 80,000 persons in the thirteenth class, that is, those worth more than \$20,000 in 1865. Grant and Seward had objected to the inclusion of this class, but Johnson insisted on the exception in order, as James G. Blaine stated, to punish a class of Southerners whom he regarded as being responsible for the rebellion and of whom he was naturally jealous. (Grant had also objected to excepting graduates of West Point and Annapolis from the general benefit of amnesty.)

In the National Archives at Washington are manuscripts very properly called the Amnesty Papers. At least that is what they were labeled in the War Department, which received them from the Department of Justice in 1894 and kept them in seventy-eight boxes, or files, until transferring them to the National Archives a few years ago. These papers are the "special" applications for pardon by many thousands of persons excepted from the benefits of President Johnson's first proclamation of amnesty.

There are some fifteen thousands of these individual petitions in the collection. This number is a rough estimate. There may be many more, but only about 13,500 petitions were granted. Some applications never reached Washing-

ton, since they had to pass through the offices of the governors of the states in which the petitioners lived, and others that did reach the capital were never placed with the great mass of petitions. Moreover, there are numerous letters relating to the pardoning business that may be found among the papers of many prominent persons of the period. With each request for clemency is (or should be) filed the writer's amnesty oath. Often there is also filed with the application at least one memorial (often that of the governor of the petitioner's state) to the President by interested persons imploring clemency for the petitioner. Sometimes these memorials are very strong appeals and have many signatures.

Naturally the disfranchised and otherwise proscribed Southerner was anxious to be pardoned and have his rights and privileges restored. Until this was done, he could neither acquire nor transfer titles to properties; nor could he obtain copyrights and patents. The New York *Herald* for November 16, 1865, states that the first West Point man to be pardoned was a certain Major Echols, who desired a patent on something which the government wished to use. The authorities were anxious for Echols' services as an inventor and advised clemency. The Southerner often found it difficult to secure employment and to engage in any business whatsoever. He even hesitated to marry. Moreover, his property was in danger of confiscation; and, worst of all, he was threatened with indictment and conviction for treason. The desire to participate in the program of reconstruction, however, was the impelling motive in the applications of many.

The petitioners represented every activity in the South during the rebellion. From the lowest to the highest officials—save one—in the Confederacy came requests for clemency. Jefferson Davis never asked for pardon, but Vice President Stephens and other civil leaders did; and Robert E. Lee very early set the example for those who had led the armies in the futile struggle for independence. The late Professor Walter L. Fleming gave forty-nine occupations in Alabama that excepted the people engaged in them from the benefits of amnesty. His list indicates the wide range of those thus disabled in all the states. There were tax assessors and receivers, postmasters and mail contractors, cotton agents and commissioners of appraisement, enrolling officers and generals in the armies, district attorneys and state and Confederate judges, graduates of West Point and Annapolis, state printers and custom officers, wealthy planters and businessmen, Confederate governors and congressmen, and many others whose activities placed them under the displeasure of the government.

Women as well as men were affected, and special provisions were sometimes made as to when they might take the amnesty oath. In Savannah, for example, men were instructed to apply at the provost marshal's "office on Bryan Street between nine and twelve A.M. and ladies . . . at . . . the Custom House between one and four P.M. each day." In fact, all were obliged to obtain pardons if they were to escape punishment and again enjoy civil and political rights and privileges in their respective states and in the nation, for it must be remembered that the punitive laws passed during the rebellion were still in force and applying to those in the excepted classes until they obtained pardons. The sensible thing for those people to do, therefore, was to recognize the exigencies of the time and ask for clemency. Of course, there were many who did not apply, but waited instead for further developments, which might include another amnesty with no exception at all. It was more than two years, however, before Johnson proclaimed a second amnesty, and it was not universal.

Often the petitions to the President were brief requests for pardon, accompanied only by the applicants' oath of amnesty. Many times, however, they were long and well-prepared defenses of the Southern cause with suggestions of the proper course to pursue in dealing with the South, now that the war was over, the Union preserved, and the end of slavery assured. And in this connection it might be noted that the Amnesty Papers indicate, first, that Negro slavery was generally regarded as having been the paramount cause of the Civil War, and, second, that the failure of the Confederacy to gain independence was also regarded as ending forever the existence of that institution in the United States. Nevertheless, there were persons who endeavored to excuse themselves for supporting the Confederacy. Some also declared that they had remained steadfastly loyal to the Union and should therefore receive immediate, favorable consideration. Others stated that they had been forced to aid the South and

consequently deserved clemency. Only a few, apparently, misrepresented their part in the rebellion in order to receive favor more readily.

Many petitioners went to their respective state capitals to influence their governor to approve and forward their applications to the President. Others remained at home and depended on friends or agents to look after their interest. In fact, the provisional governors were soon very busy receiving petitioners and their friends, and examining applications. William W. Holden of North Carolina, left a good account of his "very heavy task" in performing this duty. The Provisional Governor of South Carolina, Benjamin F. Perry, also left an interesting account of his experience in administering the President's amnesty. "One mail," he states, "brought me no less than one hundred and fifty letters! They were mostly for offices and pardons. . . . This utter destitution of the country seemed to make everyone ravenous for office. . . . But the applications for pardon were more numerous than even those for office. . . ."

It appears that only a small number of petitions had been granted by the middle of August, 1865. When the subject of amnesty was discussed in a Cabinet meeting on the eleventh of that month, "the President . . . said that few pardons had been granted notwithstanding the clamor that was raised. No one who had been educated at public expense . . . , no officer of the Army or Navy, no member of Congress who had left his seat, no member of the Rebel government who had deserted and gone into the service had been pardoned, nor did he propose to pardon anyone of that class. It was understood that neither Davis, Stephens, nor any member of the Rebel Cabinet should be pardoned."

The above statement shows that Johnson had not yet departed very far from his earlier position in respect to punishing some of the Confederates. Nevertheless, the approaching conventions authorized under Johnson's plan of reconstruction caused many in the excepted classes to try to hasten action on their petitions so that they might qualify to sit in these conventions. Furthermore, there would soon be many state and national offices to be filled, and they were something to be desired. So, as August passed and September days came, there was much activity in Washington, which indicated that pardons ere long would be granted in large numbers.

A combination of circumstances operated to turn Johnson to a course of leniency in dealing with the South. Perhaps the first and most significant influence was Lincoln's clemency, which, in a sense, became the new President's heritage. President Johnson could hardly avoid adopting, in the main, his predecessor's program of reconstruction. He doubled Lincoln's number of excepted classes in his amnesty measure, and to that extent his policy was more severe than his predecessor's; but, on the whole, as in Lincoln's plan, the states of the Confederacy were to return as quickly as possible to their former condition in the Union. Furthermore, Lincoln's apparent willingness to pardon anyone who properly applied for clemency was plainly incorporated in Johnson's proclamation. This mitigating provision soon caused the measure to lose its severity, and Johnson ventually became as lenient as Lincoln had been.

Probably the new President's most significant inheritance from his predecessor was Secretary of State William H. Seward, whose pacific and clement disposition was undoubtedly a determining factor in Johnson's administration. Seward had learned much in his association with Lincoln and was now able to temper the avenging zeal of his new chief with something of that spirit of clemency so characteristic of the late President. Fortunately, the harmony and mutual confidence which had developed between Lincoln and Seward were soon manifested between Johnson and Seward, and the persuasive and conciliatory Secretary very clearly influenced the President to adopt a milder course in dealing with the Confederates. Apparently, Seward desired his inclination toward leniency to be appreciated, for he is quoted as saying in referring to those excepted in Johnson's proclamation of amnesty: "They come to me . . . as if I were more inclined to tenderness than others, because I have been clam and cool under political excitement." Lincoln's policy of mercy surely had a wholesome influence on Seward, who hardly seemed like the fiery abolitionist of former days. Even the attempt on his life when Lincoln was assassinated appeared to lessen his vindictiveness.

A third factor in diverting Johnson from his original intention of dealing harshly with the Confederates was the compliant spirit of most of their leaders. Their arguments in defense of the Southern cause and their apparent willingness to abide by the consequences of their defeat could hardly help affecting anyone of intelligence. The logic of men like Reagan, Campbell, and

Stephens from the South, supported by such men as the Curtises from the North, certainly influenced Johnson as he faced the problems of reconstruction.

Then there were political motives behind Johnson's measures. It would have been strange indeed if he had not considered his own interests in acting on matters pertaining to the dominant issue of his administration—the restoration of the late Confederate States and the treatment of their leaders. Johnson had been a politician a long time and owed his present position largely to the fortune of politics. There were also state and national elections which he might influence, and, of course, the possibility of his nomination and election to the presidency in 1868 occurred to him. Nevertheless, in justice to him, it should be said that he did earnestly desire to do what would contribute to the most satisfactory settlement of the controversial problem of dealing with the leaders of the Confederacy.

As time passed, therefore, the number Johnson professed to be reserving for punishment became smaller and smaller. This caused the Radicals much apprehension, especially since the amnestied Southerners seemed to be running their state governments in such manner as to deny the Negroes the fruits of their newly gained freedom. Furthermore, the opposition feared that the pardoned secessionists, if admitted to representation in Congress, would unite with the Democrats of the North and obtain control of the government. This the President's enemies determined never to permit, as they had already clearly indicated in December, 1865, by refusing to seat representatives chosen by the states lately in rebellion. Even before the Joint Committee on Reconstruction reported, they evolved the Fourteenth Amendment to the Constitution. The third section of the amendment was particularly intended to deny the right to hold any public office, state or national, civil or military, to those who, "having previously taken an oath . . . to support the Constitution . . . shall have engaged . . . in rebellion against the same, or given aid or comfort to the enemies thereof." Thus the political effect of the President's pardons would be nullified, since the proposed amendment further provided that the imposed disability could only be removed "by a two-thirds vote of each House" of Congress.

While Thaddeus Stevens was introducing the Amendment to the House, the question of its conflict with the President's power to amnesty, as conferred in Section 13 of the Confiscation Act, arose. James G. Blaine wanted to know if the proposed action did not place the members in the attitude of rescinding by constitutional amendment what had previously "been given by Act of Congress and by Presidential proclamation issued in pursuance of the law." He also suggested that such a course could "be justly subject to the charge of bad faith on the part of the Federal Government." In short, he desired to know what would be the condition of those who had been amnestied before the ratification of the amendment.

Thus, there developed early in 1866 a serious problem involving the effect of the disability clause in the proposed Amendment on the President's pardons already granted under the mitigating clause of the Confiscation Act. Furthermore, the situation was further complicated by the recognized constitutional right of the President to grant reprieves and pardons. Since Johnson was charged with using his pardoning power to re-establish the rebels in control of the South, the controversy had a real political significance, to which the Radicals were obliged to give immediate attention. They deemed it mandatory, therefore, to distinguish between presidential and congressional pardons. Did the President have the constitutional power to proclaim amnesties, or was he limited to reprieves and pardons except when authorized by Congress to grant amnesties? Just what was meant by pardons in the Constitution anyway? The document did not include the word amnesty. In short, were the terms "pardon" and "amnesty" synonymous, or did they have different meanings and applications? Moreover, did Congress have the power to bestow pardon and amnesty? The Radicals were impelled to define the words so that the power to pardon would work to their advantage and not to the interest of the President. Webster's and Worcester's dictionaries defined pardon and amnesty as synonymous, and Nevada's highest court stated in 1870 that the words had the same meaning, a decision confirmed by the Supreme Court in 1877. These definitions of course had no effect on Congress in the 1860's.

As soon as Congress met in December of 1866, the House hurriedly passed and sent to the Senate a bill to repeal Section 13 of the Confiscation Act. This measure was intended to rescind the authority which Congress had given the

President (July 17, 1862) to extend pardon and amnesty by proclamation, and its advocates believed its passage would restrain Johnson in his career of leniency. The repeal would leave Johnson to rely solely on his disputed constitutional power to grant amnesty by proclamation; and, if he endeavored to grant such clemency again, his act would subject him to grave charges of high crimes and misdemeanors.

The Senate (with eighteen members "absent") passed the bill on January 4 by a vote of twenty-seven to seven. President Johnson refused to sign it, but Congress quickly overrode his veto, and the measure became a law on January 7.

One ostensible reason for the repeal was to deprive "the President of a plausible answer to one of the grounds of impeachment—his abuse of the pardoning power." Furthermore, his general amnesties, if they were to be others, would also be put in an unconstitutional light before the country.

The nation was to learn whether Congress had really curtailed the Chief Executive's power to proclaim amnesties. The repeal of the clement section of the Confiscation Act was certainly a challenge to the President. Would Johnson respect the will of the Radicals, so emphatically manifested in legislation, by confining himself to granting individual pardons? His opponents had left him, so they believed, only this constitutional prerogative; yet his numerous special acts of clemency were to them still very objectionable, since the reported lists contained so many persons of property and influence—7,197 in the thirteenth exception by May 4, 1866.

Johnson had been urged from time to time to proclaim a universal amnesty. Even while the measure to repeal Section 13 was on his desk for his approval—which he never gave—he seriously considered issuing another proclamation. In fact, the day (January 8) following the passage of the rescinding bill, he discussed with his Cabinet the advisability of another amnesty.

One way of extending clemency, of course, was by granting special pardons, but that method entailed too much individual consideration. Moreover, there were many thousands in the excepted classes who had not applied for pardon, and, according to the terms of the first proclamation, special pardons were to be given only to those who petitioned for clemency. There were civil benefits derived from pardon and amnesty besides the political privileges which congressional reconstruction measures now denied. Yet, apparently, another amnesty was desired because of the political benefits it was expected to confer. A second proclamation, therefore, seemed certain to be issued in the near future.

In due time, therefore, the President formulated a proclamation (to which both Welles and Seward had contributed) and issued it on September 7, 1867. This amnesty was not universal; but it is worth noting that wealth was no longer a hindrance to clemency, so that many in the twenty-thousand-dollar class who had not applied for pardon were now relieved. Furthermore, persons in other classes excepted in Johnson's first proclamation and not yet pardoned received the benefits of presidential clemency. In fact, the measure had only three general exceptions: (1) the President, Vice President, heads of departments, foreign agents, those above the army rank of brigadier general and naval rank of captain, and the governors of the several Confederate States; (2) "all persons who in any way treated otherwise than as prisoners of war, persons who in any capacity were employed in the military or naval service of the United States;" and (3) all who were "actually in civil, military, or naval confinement, or legally held to bail either before or after conviction. . . ." This last exception also included those who were implicated in any way in the assassination of President Lincoln.

While Congress was engaged in the impeachment of Johnson, the President was considering another proclamation of amnesty. He was cautious enough, however, to wait until the trial had ended before acting. Apparently hoping to increase the prospect of acquittal, he also hesitated to grant individual pardons as the time approached for the senators to vote. Johnson was not convicted but was cleared by actions of the Senate on May 16 and 26, 1868. It might also be observed that during all this bitter controversy a vituperative press kept public interest at high pitch by predicting undesirable developments, even to kidnapping the President and armed rebellion.

On June 26, President Johnson found all members of his Cabinet in favor of another amnesty. Seward, however, advised excepting those against whom legal proceedings were pending, and Hugh McCulloch, the new secretary of the

treasury, and General John M. Schofield, the new secretary of war, thought that those who had gone abroad and had not returned should be excepted. McCulloch also insisted on excepting John Cabell Breckinridge, whom he called "a double traitor," meaning that he had been disloyal both to his native state of Kentucky and to the nation. This session of the Cabinet ended with the understanding that a "proclamation would be prepared and submitted for consideration at an early day."

Frequent considerations of a third proclamation of amnesty were in keeping with the interest Johnson's friends had in his candidacy for the Democratic nomination for the presidency in 1868. The convention was to convene in New York City on July 4, and they believed another amnesty might attract greater support from the Southern delegates.

At any rate, the President did proclaim an amnesty on the day the convention convened, but it was not universal. If Johnson had any qualms of conscience over his one exception, perhaps he found consolation in the knowledge that some members of his official family had advised the omission, and that because of it the Radicals would not find the proclamation so objectionable. At the last moment, therefore, he excepted "such person or persons as may be under presentment or indictment in any court of the United States having competent jurisdiction upon a charge of treason or other felony. . . ." To all others he granted "unconditionally and without reservation . . . a full pardon and amnesty . . ." under the laws of the United States. The President stated that he believed this amnesty would "tend to secure a complete and universal establishment and prevalence of municipal law and order . . . in the United States, and to remove all appearances presumptuous of a retaliatory or vindictive policy on the part of the Government attended." A noticeable difference between this proclamation and the preceding ones was the omission of an oath of allegiance (or amnesty oath) to the United States. This was probably because such an oath was already required in the congressional reconstruction measures.

The amnesty measure apparently, gained very little for its author. Even if it had been universal, the result would most likely not have been different, as far as Johnson's nomination for the presidency was concerned. All that can be said for the proclamation is that it received the endorsement of the Democratic convention, which also recommended in its platform "amnesty for all political offenses. . . ." In this manner the Party went on record as being in favor of pardoning everyone who had supported the Confederacy.

The third proclamation left Jefferson Davis, John Cabell Breckinridge, Robert E. Lee, Simon Bolivar Buckner, and a few others unpardoned. Davis, as has already been shown, was under indictment for treason. His trial had been deferred in June to November, then to December, 1868, and then to no particular date at all. The indications for sometime had been that he would be pardoned before he was actually brought to trial. This eventually happened, for on Christmas Day in 1868, the President proclaimed "unconditionally and without reservation, to all and to every person, who directly or indirectly, participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States. . . ."

Johnson plainly stated his reasons for this universal amnesty. Since the "authority of the Federal Government" had been re-established throughout the United States, he believed there was no further need for "such presidential reservations and exceptions" as he had provided in the other proclamations. He also thought "that universal amnesty and pardon for participation in the rebellion" would tend "to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the National Government. . . ." Thus, the few remaining unpardoned leaders of the Confederacy were finally restored to all their former civil and political privileges in the nation, except for the disability placed on them by the Fourteenth Amendment, which had gone into effect on July 28, 1868.

PART III, SUMMER 1860

Before the passage of the reconstruction acts in March and July, 1867, persons began appealing to members of Congress for relief from disfranchisement. There were those, of course, whom the President had not yet pardoned, and doubtless some people believed that Congress, rather than the President,

should remove disabilities incurred by supporting the rebellion. Perhaps many were influenced by the repeal, early in January of 1867, of the clement section of the Confiscation Act. The proposed Fourteenth Amendment, whose ratification had failed late in 1866, was also evidence of the determination of the Radicals to cause the ex-Confederates to petition Congress for the privilege of holding office. In fact, the drastic plan of congressional reconstruction, soon created and administered, provided no alternative, even the privilege of voting was seriously curtailed by the act of March 2, which made the ratification of the amendment of a condition of restoration, and by a second law enacted to implement the first.

Some appeals came from Southerners who professed to have supported the Confederacy unwillingly, or who at least were not among the leaders of secession. Simeon Corley of South Carolina, told Senator Sumner (January 21, 1867) that a distinction should "be made between the people of the South and their disloyal leaders," leaving, if possible, "a majority of the white population in possession of the franchise and their real estate." Judge J. M. Wiley of Pike County, Alabama, wrote Senator Fessenden that he had labored for the Union until his state seceded, after which he supported the Confederacy, though expecting its failure. Having taken the oath of allegiance and desiring the prosperity of the whole country, he urged the immediate relief of a few prominent men to encourage others to believe that they too would "someday be relieved."

Many petitioners expressed sympathy for the growth of the Republican party in the South. Judge Wiley was thus disposed, and Robert P. Dick, a pre-war Democrat of Greensboro, North Carolina, told Senator John Sherman that he "was never a rebel" and that he still loved the United States government "better than any other on earth. . . . I would be content to remain disfranchised for a time," he continued, "but I know that I can render very efficient service to the Republican party in the coming canvass. . . ." Rick actually became one of the organizers of that party in his state late in 1867. Indeed, one competent student of this period states that letters from thorough-going Democrats can hardly be found among the papers of Radicals who received appeals for mercy. First consideration, apparently, was likely to be given to those whose relief would augment the strength of the Republican party in the South.

When it became known that Senator Sherman had promised to introduce a resolution to relieve former Governors Joseph Brown of Georgia and R. M. Patton of Alabama, who had accepted congressional reconstruction, others asked to have their names placed in the measure. Such persons usually minimized their support of the rebellion. Thomas W. Alexander of Rome, Georgia, in asking to be included with Brown, stated that his transgressions just barely placed him in the disfranchised class, thereby leaving him "in bad company from which" he desired to escape. G. Mason Graham of Louisiana, in requesting relief for himself and for W. H. Hough, said that his offense had consisted only in succoring starving Confederate soldiers until a Federal brigade had exasperated him by camping on his property and consuming his entire stock of provisions for both man and beast.

In spite of serious efforts to enact such relief measures, it was more than a year before Congress began relieving persons disabled by the Fourteenth Amendment. In March of 1868, the House quickly passed a bill to remove the disability from R. R. Butler of Tennessee so that he might represent his district in that body. When the Senate came to consider the measure, certain technicalities arose which delayed action. Although Butler was a Tennessean who had served creditably in the Union army from September, 1863, to May, 1864, he had been disfranchised because he had, earlier in the war, been a member of a Confederate state legislature. For this he was disabled even though there was no doubt of his subsequent loyalty. Party jealousies caused the bill to be recommitted, but on June 19 it became a law.

In relieving Butler, Congress set a precedent for more removals, and six days later it enacted a law thus affecting about 1,350 others. The hazardous course of this measure through Congress illustrated the questionable nature of this method of exercising re-enfranchisement by legislation. Much time was consumed in reading lists of names and discussing the merits of individual requests for relief.

The beneficiaries of this act could not take the ironclad oath of June 2, 1862, which required them to swear that they had never voluntarily supported a rebellion against the United States. At first a modified form of this oath was administered, but on July 11, 1868, Congress supplied an easier affirmation for removals under the amendment. The new oath provided that persons thus relieved should swear "to support and defend the Constitution of the United States against all enemies, foreign and domestic," and to discharge faithfully the duties of the offices on which they were entering. The disabled by the third section of the amendment (i.e. those who had not previously taken an oath . . . to support the Constitution of the United States" and later supported the Confederacy) and who still had to take the ironclad oath, because they had aided the rebellion. Nearly three years later (February 1, 1871), but not without opposition, Congress applied this oath (of July 11, 1868) to them.

For nearly ten years after the promulgation of the Fourteenth Amendment, Congress gave much time to the removal of disabilities thus imposed. Sometimes these private acts, as in the case of R. R. Butler, applied to only one person; at other times, as in the law, of July 25, 1868, they applied to many. In every such measure the names of the beneficiaries were given, even when the lists were long; and as in the case of petitions to the President for pardon in 1865 and 1866, the requests to Congress for removals were numerous. Each appeal was expected to receive special consideration to determine its merits. This required much time that might well have been devoted to other needed legislation, but Congress continued to make removals in special acts until by March 4, 1871, 4,616 persons had been relieved.

As might be expected, therefore, efforts were made from time to time to enact an amnesty law, either general or universal in scope. The Senate refused a gesture in that direction as early as December 9, 1868, by rejecting a motion to "add the words, 'and all other citizens of . . . South Carolina'" to a bill to relieve Franklin J. Moses, who had been elected chief justice of his state, but who had been a state senator for a long time before the war. About eighteen months later (June 13, 1870) the House also refused "to suspend the rules and put upon its passage a bill" to grant universal amnesty. The time was not yet ripe for even a general amnesty law, much less one with no exceptions.

By 1871 the pressure for relief had become so great and the process of passing special acts covering individual cases so unsatisfactory that President Grant recommended a general amnesty in his annual message of December, 1871. He stated that he did "not see the advantage or propriety of excluding men from office merely because they were before the rebellion of standing and character sufficient to be elected to positions requiring them to take oaths to support the Constitution. . . ." Nevertheless, he recommended that if there were "any great criminals, distinguished above all others for the part they took in opposition to the Government, they might in the judgment of Congress, be excluded from such amnesty."

The President's words indicated truly that complete relief from the disqualifying clause of the Fourteenth Amendment was still far off. Nevertheless, sentiment for the immediate restoration of the full privilege of citizenship to thousands of persons was sufficient to demand the early enactment of a general amnesty law. Blaine later described the situation thus: "The impossibility of examining into the merits of individuals by tens of thousands, and establishing the quality and degree of their offenses, was so obvious that representatives on both sides of the House demanded an act of General Amnesty, excepting therefrom only the few classes whose names would lead to discussion and possibly to the defeat of the beneficent measure."

A special report, made to the Fifty-fifth Congress, of the total number disabled by the Amendment placed the figure at only eighteen thousand. In 1898, while speaking on the universal amnesty measure, John J. Jenkins of Wisconsin, quoting Blaine's statement, said: "It has been variously estimated that this section, at the time of the original insertion in the Constitution, included somewhere from 14,000 to 30,000 persons. As nearly as I can gather the facts of the case, it included about 18,000 men in the South."

In response to Grant's recommendation, a bill was introduced in the House, on December 11, 1871, providing for the removal of disabilities from everyone remaining disqualified. The Judiciary Committee, however, did not favor unconditional amnesty and reported a bill on January 15 excepting only members

of Congress and army and naval officers who had resigned to aid the Confederacy. This was the measure of the previous April without the clause excepting members of state conventions who had voted for secession. The bill provided that those who would be relieved should take the oath of allegiance to the United States. The House suspended the rules and passed the measure by a vote of 171 to 31.

When the bill came before the Senate, it was amended (February 9—by the vote of Vice President Colfax—to include a guarantee of civil rights to the Negroes: the galleries applauded lustily. The Radicals, led by Sumner, insisted in this manner that the welfare of the freedmen was a paramount issue and that there should be no general removal of disabilities from the Southern until the Negroes were given equal privileges with the whites in such public places as hotels, theatres, schools, public conveyances, and in jury service.

The friends of this bill could not muster the necessary votes to secure its passage. Southern senators would not support it with the amendment providing civil rights for the Negroes. Senator Francis P. Blair of Missouri, who opposed the measure in its amended form, believed it could have been easily passed if the civil rights feature had not been attached. The Senate rejected the measure on May 10, 1872, by a vote of thirty-two to twenty-two.

On May 13 another general amnesty bill was passed by the House without debate and sent to the Senate. It excepted "Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judiciary, military, and naval service of the United States, heads of Departments, and foreign ministers of the United States," who had supported the Confederacy. The simplicity of the bill indicated better judgment than its proponent, Benjamin F. Butler, had shown in proposing his earlier measure to the House of the Forty-first Congress. Civil rights and amnesty, however, were now to be put into separate measures, since only a bare majority was necessary to pass a bill favoring the colored people, while two-thirds of each house was required to re-enfranchise the whites.

On May 21 the Senate began considering civil rights for the Negroes in advance of amnesty for the late slave-owners. Senator Sumner was ill and absent; consequently, not only were civil rights considered separately, but equality in public schools and jury service were more easily stricken from the bill. In this form the Senate passed the measure and immediately gave attention to amnesty. But before action was taken on the latter measure, the obdurate Senator from Massachusetts was routed out of bed and taken to the Senate where he criticized his colleagues for the change made in the civil rights bill and bitterly protested against its passage during his absence. He desired to amend the amnesty bill to guarantee equal rights in public schools and in jury service to the colored race. "Sir, the time has not come for amnesty," he declared in desperation. "You must be just to the colored race before you are generous to former rebels. . . ."

In vain did Sumner plead his cause, for the Senate passed the amnesty bill on the early morning of May 22 by a vote of thirty-eight to two, and the President signed it the next day. The House steadfastly refused to pass the civil rights measure, so the Negroes got no relief.

The general amnesty law of 1872 re-enfranchised many thousands. According to Rhodes and Oberholtzer, the disability had already been removed from nearly five thousand by previous special acts of Congress, and these two eminent authorities believed that from three to six hundred still remained disqualified to hold office. Others have placed the number as high as 750. Nevertheless, after May 23, 1872 every seat in the House and Senate was occupied for the first time since 1861, and that was something to be appreciated. Seven of the ten states affected by congressional reconstruction had been restored by 1868 and the remaining three by 1870.

At the time of the enactment of this amnesty law, there were *quo warranto* proceedings in several Federal circuit and district courts to remove from office certain persons who were alleged to be holding positions in violation of the third section of the Fourteenth Amendment. On May 31, 1870, Congress had authorized such removals. Believing that the clement act of May, 1872, relieved these persons, President Grant on June 1 directed "all district attorneys having charge of such proceedings and prosecutions to dismiss and discontinue the same. . . ." Evidently Grant believed that only Congress could grant amnesty and acted accordingly.

The Forty-second Congress qualified twenty-seven persons to hold office, and the Forty-third and Forty-fourth qualified forty-seven and forty-three, respectively. The beneficiaries were often men of considerable prominence, like former members of Congress Alfred Iverson of Georgia, Lucius Q. C. Lamar of Mississippi, and J. H. Reagan of Texas. Generals P. G. T. Beauregard and Joseph E. Johnston and former United States Senator and Confederate Secretary of the Navy Stephen R. Mallory were also relieved. These men, like others, were re-enfranchised in order that they might qualify for certain high offices in the government which they had once served well and had later rebelled against.

Of course, earnest efforts were made to enact another general amnesty law, and many wanted one that would have been universal in scope. Realizing that the number of persons remaining disqualified was "very small, but enough to keep up a constant irritation," Grant recommended a "general amnesty" in his message to Congress on December 1, 1873. "No possible danger," he said, "can accrue to the Government by restoring them to eligibility to hold office." By "general" he doubtless meant an amnesty with no exceptions whatever. A week later, Horace Maynard introduced in the House a bill intended to qualify everyone remaining disabled under the Fourteenth Amendment and to substitute the oath of July 11, 1868, for that of July 2, 1862. This measure would have qualified Jefferson Davis for office. And why not? The Vice President of the Confederacy had already been relieved by the general amnesty of May 22, 1872, and was soon to be elected to Congress. The magnanimous House passed the bill, but obstinant Charles Sumner caused its defeat in the Senate by again insisting on civil rights for the Negroes as an exchange for the proposed re-enfranchisement of their former masters.

The congressional election of 1874 gave control of the House in the Forty-fourth Congress (1875-1877) to the Democrats. Consequently, Maynard's amnesty bill became the dominant issue in that body during the first session of the new Congress, with Blaine, who had lost the speakership as a result of the election, its most formidable opponent. When this measure was finally brought to a vote by Samuel J. Randall of Philadelphia, on January 10, 1876, Blaine made his notorious "bloody shirt" speech, in which he heaped all the vicious vituperation at his ready command upon the ex-President of the Confederacy. He desired to except Davis by name in the amnesty, though not because he was "the head and front of the rebellion. . . . But," said he, "I except him on this ground: that he was the author, knowingly, deliberately, guiltily and willfully, of the gigantic murders and crimes at Andersonville. . . . And I here before God, measuring my words, knowing their full extent and import, declare that neither the deeds of the Duke of Alva in the Low Countries nor the massacre of St. Bartholomew, nor the thumb-screws, and engines of torture of the Spanish Inquisition begin to compare in atrocity with the hideous crime of Andersonville."

The debate on the universal amnesty bill of 1876 ceased on January 10, when it became known that the Senate had just passed resolutions of sorrow for the death, on July 31, 1875, of Senator and former President Andrew Johnson. He had been elected to the United States Senate in January, 1875, where some Senators who had voted to remove him from the presidency were still sitting and where, a little later, he brilliantly defended his reconstruction policy and bitterly denounced President Grant. The polemic on the amnesty measure was resumed the next day and continued several days longer, despite the fact that probably a thousand other bills were on the calendar. The measure finally lost by a vote of 184 to 97. Another futile attempt was made on January 17 to secure a general amnesty excepting only Jefferson Davis.

In June 1862, Congress enacted a law requiring Federal petit and grand jurors to swear that they had never given aid to any insurrection or rebellion against the United States. In April, 1871, this requirement was made applicable only to cases involving "any suit, proceeding or prosecution based upon or arising under the provisions" of the Fourteenth Amendment. This rule greatly reduced the number of persons in the Southern states who could qualify for jury service. The requirement was also annoying to many Northerners who saw no good reason why a loyal man should take such an oath. Former Confederates who qualified for office by being relieved of the disability imposed under the third section of the Fourteenth Amendment could not serve as ju-

rors because they could not take the oath. After July 11, 1868, however, they were required to swear only "to support and defend the Constitution" and to discharge the duties of their offices faithfully.

Futile attempts were made in the Forty-fifth Congress (1877-79) to remove the disability from Federal jurors. Late in 1877 the Democratic House approved the proposed removal, but the Republican Senate refused to concur in their action. The Republicans were evidently not in very good humor after the Hayes-Tilden contest over the presidency and their losses in the South in the election of 1876. Their reluctance to pass individual relief measures caused Senator James Beck of Kentucky to observe that the sentiment for amnesty had been strong in 1873, but that politics had since killed the movement. Beck was assisted by Senators F. Bayard of Delaware and Augustus H. Garland of Arkansas and Representative Samuel S. Cox of New York in efforts to remove the jurors' oath and the disability of the third section of the Amendment Bayard's bill (April, 1879) to remove the test oath for jurors passed the Senate (June, 1879), but the Republican minority in the House defeated it a few days later by repeated roll calls.

The Democrats now resorted to riders to secure the removal of the test oath for jurors. In supporting such an amendment to a bill for judicial expenses for the fiscal year beginning July, 1870, Senator John T. Morgan of Alabama stressed the fact that he could be a United States Senator but not a jurymen. A little earlier, Cox had said: "General Joseph E. Johnston and others who participated with him in the rebellion are only required to take the oath to the Constitution, while the gallant band of Union soldiers led by . . . General Garfield . . . must file down in platoons . . . and take the oath . . . swearing so help them God that they never, *never*, never did bear arms" against the United States. This poignant argument and the knowledge (which Senator Morgan had also emphasized) that the whites of the South were obliged to resort to Negro jurors had the desired effect. Both houses passed the bill, but President Hayes vetoed it because of this and other amendments. Failing to over-ride the veto, the House and the Senate quickly passed another similar bill, which the President was obliged to sign (June 30, 1879) so that funds necessary for judicial expenses would be available.

The task, however, had to be done over, for, in the revision of the laws, the disability sections slipped into the code again. Finally, under the leadership of John A. Logan, the Senators put through a threefold measure. It excluded from appointments in the army and navy those persons who had resigned commissions in 1861 to enter the Confederate service; it repealed the test oath of jurors; and it required all United States officials except the President to take the oath of July 11, 1868, to support the Constitution and perform their duties faithfully. The will of the Senate was acceptable to the House, and the bill became a law with President Arthur's approval on May 24, 1884.

At last Federal jurors and civil officials were no longer obliged to swear that they had never aided a rebellion against the United States. But there still remained work to be done if disabilities were to be removed from every living person who had supported the late rebellion. Section 1218 of the revised code needed to be repealed so that former Confederates might be appointed to commissions in the army and navy. There were also those who had not yet been relieved of the disability imposed by the third section of the Fourteenth Amendment. Futile attempts were made during the next ten years (1885-95) to remove the restriction on military and naval service. Finally, on December 18, 1895, Democratic Senator David B. Hill of New York demanded the immediate repeal of section 1218 of the Revised Statutes. The fear of war with Great Britain over the Venezuelan boundary was one alleged reason for such action. Republican Senator Orville H. Platt of Connecticut thought Hill's measure was unwise and prompted solely by this fear. But Democratic Senator Daniel W. Voorhees of Indiana believed it was "an expression of nationality, of brotherhood, of total reconciliation and of the process of healing all that had passed" since the outbreak of the Civil War. The Senate's action may have been influenced by altruistic motives or by fear of a war with Great Britain. At any rate, the Senate passed the bill, without division, on December 24, 1895. Late the following March the House unanimously approved the measure, and, with the President's approval, it became a law.

Apparently a ware scare hastened the removal, in 1896, of the last disability on former Confederates in the military and naval service, and thereafter per-

sous who had resigned commissions in the army and navy in 1861 to cast their lot with the Confederacy might fight for the Union. Of course, the law was practically useless, for nearly all who had worn the Gray in the early 1860's were too old to fight in another war. Moreover, President Cleveland and his Secretary of State, Richard Olney, happily accepted a peaceful settlement through arbitration of differences with Great Britain.

By 1896 there was still need for a final amnesty that would place in oblivion the disability that remained on anyone under the Fourteenth Amendment. Congress had gone along, too cautiously perhaps, relieving persons now and then during the twenty years after the failure of the amnesty bill of 1876. Political rancor thereafter precluded any prospect of a law with universal application. One by one the disfranchised ex-Confederates had passed away, thereby diminishing the number remaining disabled. Their leader, Jefferson Davis, died late in 1889, still disqualified from holding any office in the land of his birth and of which he was a citizen. At the time of his death he was among the very few remaining disabled.

Of the estimated 750 excepted by the general amnesty of 1872, 212 had been re-enfranchised by special acts of Congress. General Joseph Wheeler of Alabama, who had been relieved in June 1874, was elected to Congress a few years later. He left his seat in 1898 to command a division in the war with Spain, returning, after gallant service in Cuba, to defend the Republican administration when it was charged with grossly neglecting the soldiers in the field. Generals E. Kirby Smith and John C. Pemberton were reenfranchised in June, 1878, and June, 1879, respectively, but neither ever held an office thereafter.

The last two men to be relieved by special acts of Congress were John Taylor Wood of Louisiana, an officer of the *Merrimack*, and Colonel William E. Simms of Kentucky. Wood was a grandson of Zachary Taylor, whose daughter had been Jefferson Davis's first wife, and the bill to relieve him was hurriedly passed by both houses and signed by President Cleveland on February 12, 1897. A little more attention was given to Simms. In introducing the measure for his relief, Representative William C. Owens of Georgetown, Kentucky, said that the beneficiary was an old man who had but a few more years to live, and that he was anxious before his death to have "the ban of his country's disfavor" removed from his record. Two other Kentuckians, James B. McCreary of Richmond and Walter Evans of Louisville, recommended the petition, and the measure passed without reference to a committee.

When the bill reached the Senate, George F. Hoar of Massachusetts told his colleagues that Simms had been "a gallant officer of the Mexican War," that he was a member of a distinguished family, and that he was quite old and in feeble health. Hoar stated further that he had received no formal application for clemency from Simms, but that he did have a very touching letter by the Kentuckian to Justice John Marshall Harlan, in which Simms "expressed his love for his country and his desire to become fully a citizen of the United States again." By unanimous consent the bill was ordered to a third reading and passed, the President approving on February 25, 1897.

No effort to relieve any individual appears to have been made after the relief of Simms. Evidently a few still remained disabled under the Fourteenth Amendment, but this study has not disclosed their names. The relief of these few was accomplished by a universal amnesty some sixteen months after the last two individual removals. As a war scare had hastened the qualification of all living ex-Confederates for military service in 1896, so in 1898 actual war caused the passage of a universal amnesty law.

While sons of the Blue and the Gray were organizing under the Stars and Stripes to drive the last vestige of Spanish misgovernment from the Western Hemisphere, a universal amnesty bill was introduced in the Senate. In presenting the measure, William Morris Stewart of Nevada said that the "few persons . . . still unrelieved" were old and that "it would be a gratification . . . to the whole country, to have Congress do this act of kindness." The Senate passed the bill without debate, but the House changed the measure a little when it came before that body with a report from the Committee on the Judiciary. This report was a remarkable document, especially when considered in the light of the thirty-three years of disfranchisement that had been imposed on supporters of the Lost Cause. "It is to be regretted," the committee said, "that it was ever in the mind of any persons that such extreme measures were

necessary." The next sentence indicated that such Radicals as Charles Sumner, Thaddeus Stevens, and James G. Blaine had passed on and could no longer raise their voices to restrain the hand of clemency in Congress: "Years have rolled by since that great struggle closed, and the American people look at public matters growing out of the war of 1861 in calmer moments when their judgment can be trusted, and [they] are [now] willing . . . that this bill pass and the disability [be] wholly removed from the statute book."

But the most significant statement in this memorable report was the following: "The seeds of this war were sown when the Convention framed the Constitution . . . and it was only a question of time when the growth would be ready for the sickle, and the war was simply reaping the harvest. To the American people the war was worth the sacrifice. It accomplished at a terrible cost of life and money what could not be realized by any other means. . . ."

The committee did not, of course, mean to say that the Fathers intentionally sowed the seeds of the Civil War. Perhaps it was the existence of states' rights in the Articles of Confederation that caused the Convention to frame a government that made a civil war inevitable. A stronger argument, however, could not have been found against the charge of treason which had been made against the Confederates in earlier years. Such judgment from the most representative branch of Congress came too late, however, to give any satisfaction to the large number of Southerners who had contended that they had merely applied the principles laid down by the founders of the government when they organized the Confederate States of America. Jefferson Davis, Clement C. Clay, Zebulon B. Vance, Joseph Turner, Robert Toombs, Raphael Semmes, Howell Cobb, and many others who had earnestly contended that their support of the Confederacy was historically justifiable were no longer living. Nevertheless, the committee of the House had placed the Civil War in a more favorable light than had generally been accepted, and no doubt there were those then living who did find some consolation in the report and in the universal amnesty thus recommended.

The House passed the amnesty bill unanimously, and President McKinley signed it on June 8. The law provided "that the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby repealed." No oath, no exception, and no reservation whatever were required of the beneficiaries—if there really were any persons remaining disabled. Perhaps the only benefit derived from the universal amnesty act was the spirit of amity and fraternity that it encouraged. It is exceedingly doubtful, of course, that the disability thus removed should ever have been given constitutional status in the first place. Certainly an earlier universal amnesty would have been better policy.

S. DUSCHA,¹ JULIUS, "AMNESTY?"

[From Saturday Review, May 6, 1972]

One day last November a conservative, middle-aged doctor wrote his conservative, middle-aged Republican senator, Robert A. Taft, Jr., of Ohio, to tell him of a plan he had for amnesty for the thousands of young Americans who have gone underground, fled to Canada, Sweden, and other countries, or deserted from the armed services to avoid fighting a war they consider to be wrong.

Like most letters to senators, who are inundated with mail, the one from Dr. J. Z. Scott, a physician in the northeastern Ohio town of Seio, was read first by a senatorial aide. It caught the eye of Roger King, a young assistant to Taft, who then called it to the senator's attention.

Taft had been thinking about the problem of granting amnesty to draft resisters and deserters, who are estimated to number between 80,000 and 130,000. But until the senator read the letter from Dr. Scott, he had not come up with an amnesty plan he considered acceptable. Dr. Scott suggested to Senator Taft that draft resisters and deserters be given amnesty if they agree to work for four years at subsistence pay in hospitals, the Peace Corps, the Vista program, or other humanitarian endeavors, or if they are willing to sign up for a four-year hitch in the peacetime armed services.

¹Julius Duscha is the director of the Washington Journalism Center. He is currently writing a book about power in Congress.

In Washington great events are often set in motion by chance or casual actions, and so it was with Dr. Scott's letter. By mid-December of last year the letter had led to the introduction by Taft of amnesty legislation, which would establish three-year alternative service. Because Taft is a conservative not famous for sticking his neck out, and because of the emerging national interest in the subject of amnesty, his legislation attracted a great deal of attention. Since then, and in large measure because of Taft's bill, the issue of amnesty, which was once only a heady conversation piece among college students and optimistic radicals, has become the subject of a full-blown, often angry national debate—a debate that could turn out to be as bitter and protracted as the arguments over the Indochina War itself have been.

Within the last few months President Nixon has discussed amnesty at some length, the issue has been injected into the Democratic primaries, and a Senate subcommittee headed by Democratic Senator Edward M. Kennedy of Massachusetts has held hearings on the question. A wide variety of positions on amnesty has thereby been forthcoming.

The President's position has not been perfectly clear. "I, for one, would be very liberal with regard to amnesty," the President told Dan Rather of CBS News in a televised interview in January. "But," Mr. Nixon quickly added "not while there are Americans in Vietnam fighting to serve their country and defend their country and not when POWs are held by North Vietnam. After that we will consider it, but it would have to be on the basis of their paying the price, of course, that anyone should pay for violating the law."

"Paying the price for violating the law" would serve as a pretty good antonym for amnesty; some of those who have been running for Mr. Nixon's job have been more unequivocally liberal with regard to exacting no price. Senator George McGovern has come out for an unqualified amnesty, but on a case-by-case basis. Ex-candidate John Lindsay proposed a two-year alternative service plan. Senators Humphrey and Muskie have said something should be done after the war but have not specified what. (Noncandidate Kennedy has said he favors amnesty once the Indochina War is over.)

Within the context of the national political campaign, however, the debate over amnesty has been relatively mild. Discussions in other, less circumspect arenas indicate that amnesty has become an issue over which passions run high and divisions deep.

Speaking of the Vietnam resisters, for instance, Democratic Representative F. Edward Hébert of Louisiana, the influential chairman of the House Armed Services Committee, has gruffly declared: "I would send them out on a ship like the man without a country." Hébert enjoys considerable support in his lack of sympathy for amnesty. A Gallup poll last winter showed that only 7 per cent of Americans favor an outright amnesty. Both Taft and Kennedy have received more mail on the amnesty question than on any other issue except the 1970 invasion of Cambodia by American troops—and a good deal of the mail is against amnesty.

The anti-amnesty case was passionately argued by John H. Geiger, national commander of the American Legion, at the hearings on amnesty that were presided over by Senator Kennedy. Geiger invoked the thoughts of President Washington, quoting him as saying: "It may be laid down as a primary position, and the basis of our system, that every citizen who enjoys the protection of free government owes not only a portion of his property, but even his personal services to the defense of it."

Citing the American casualties in Vietnam, Geiger asked: "How can amnesty be explained to parents, wives, children—all those who have lost a son, husband, or a father in their country's service? How can we excuse ourselves to the prisoners of war, the missing in action, or to their suffering families for offering amnesty? Furthermore, what would be the effect on the morale of our armed forces if amnesty were granted to those who have violated the law and their oath of service by turning their backs and fleeing their country? Amnesty might even be the last bitter pill to our servicemen now caught in the web of confusion. . . ."

Curtis W. Tarr, the former president of Lawrence University in Wisconsin who is now director of Selective Service, argued before the Kennedy subcommittee that any general amnesty would make it impossible to continue to draft men into the army. "If amnesty made it possible to return to the full rights of citizenship without any penalty," said Tarr, "then it would be difficult to jus-

tify the continuation of inductions. Our youth could not understand such opposing policies."

The arguments for amnesty are put forward just as earnestly, and with just as much conviction. And not all of them come from liberal ranks. Kennedy noted at his subcommittee hearing that the late Cardinal Cushing of Boston, a conservative Catholic churchman, asked in his Easter sermon two years ago: "Would it be too much to suggest that we empty our jails of all the protesters—the guilty and the innocent—without judging them; call back from over the border and around the world the young men who are called deserters; drop the cases that are still awaiting judgment on our college youth? Could we not do all of this in the name of life, and with life, hope?" Major conservative religious groups such as the United Presbyterians, the United Church of Christ, the American Baptist Convention, and the National Conference of Catholic Bishops support some kind of amnesty for Vietnam resisters. There is even some backing for amnesty among the families of prisoners of war.

"Would a sweeping amnesty make it more difficult for the United States to recruit or draft an army for another war?" the historian Henry Steele Commager asked in his testimony before the Kennedy subcommittee, confronting the suggestion that amnesty would present profound practical problems. "Such speculations," he answered, "are what Lincoln called 'pernicious abstractions.' Certainly Lincoln's use of amnesty did not appear to have any effect whatever in later wars.

"There is a further point here," Commager continued. "Is there not something to be said for putting government on notice, as it were, that if it plunges the nation into another war like Vietnam, it will once again be in for trouble? After all, governments, like individuals, must learn by their mistakes, and though the process of teaching government not to make mistakes is often hard on those who undertake it, it is also often very useful. . . ."

The mounting debate can be boiled down to something like the following dialogue:

For: Resisters should not be punished for taking a position with which most Americans and many past and present public officials now agree—that American participation in the Vietnam War is morally wrong.

Against: But what of the 50,000 Americans who have died in Vietnam, and the more than 300,000 who have been wounded? And the total of 2.5 million who have served in Vietnam? Would unconditional amnesty say to these servicemen, who considered themselves loyal Americans, that they were suckers?

The moral questions are not, after all easy ones. And, unhappily, as the nation grapples with such questions, the lessons and precedents it can find in its own history are only partly relevant and somewhat inconsistent. Amnesty has been granted many times in U.S. history, usually by the President, who is given the power by the Constitution to do so. But amnesty has not been proclaimed at the end of every war. In a recent study for Senator Taft, John C. Etridge of the Legislative Reference Service of the Library of Congress counted thirty-seven instances of amnesty. (And not always for war-related acts; in 1893 and again in 1894, for example, President Harrison and President Cleveland granted amnesty for Mormons who had been convicted of polygamy.) Advocates of amnesty for Vietnam resisters usually begin their argument by noting that a presidential precedent was set in the United States by George Washington in 1795 when he proclaimed "a full, free and entire pardon" to all persons who participated in the Whisky Rebellion a year earlier in Pennsylvania.

In explaining his action to Congress, Washington wrote: "For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet my personal feeling is to mingle in the operations of the government every degree of moderation and tenderness which the national justice, dignity and safety may permit."

Throughout the early 1800s there were several instances of amnesty or mass pardons granted to insurrectionists, deserters, and even pirates, with no strings attached—except on one occasion when a proviso was included specifying that deserters be returned to duty. Then came the Civil War, and with it eighteen—or almost half—of all the acts of amnesty counted by Etridge in his survey of U.S. history. The Civil War amnesties began with the paroling of political prisoners in 1862 and did not end until more than thirty years after

the war was over. In 1898 Congress approved the Universal Amnesty Act removing all disabilities against all former rebels, many of whom were dead by then, of course.

A series of amnesties and pardons granted by President Andrew Johnson in 1867 and 1868, culminating with a Christmas Day proclamation giving a full, unconditional pardon and amnesty to "all persons engaged in the late rebellion," caused a furor in Congress, where the Senate Judiciary Committee declared in 1869 that the Christmas action was "wholly beyond the constitutional power of the President." But the matter ended there, and Congress never voted on it.

Most of the pardons granted by President Lincoln during wartime provided unconditional amnesty for deserters who returned to their posts. An action by Lincoln in December 1863, giving full pardons to persons who had participated in the "existing rebellion," was an obvious political bid for more support for the Union cause.

There was no general amnesty after World War I. Just before Christmas of 1947, two years after the end of World War II, President Truman pardoned 1,523 men who had been convicted of draft evasion during the war. But this amounted to only about one-tenth of the 15,000 evaders who had been imprisoned during the war. Again, after the Korean War, there was no general amnesty.

Plenty of precedents for amnesty thus can be found, but they are not so clear-cut as advocates of unconditional amnesty for Vietnamese resisters and deserters would have Americans believe. For the most part, general amnesties have come only after a war has ended. In addition, general amnesties have dealt with the Civil War and other internal conflicts, not with foreign wars such as the one in Vietnam. Perhaps such a distinction is not important, but it surely will be insisted upon as the debate over a Vietnamese amnesty continues.

And the debate is sure to continue for a good while, at least until U.S. troops are out of Vietnam and the prisoners have been released. Probably no President—including George McGovern, should he make it to the White House—would grant even a conditional amnesty until then. Nor is Congress likely to move very swiftly on Senator Taft's measure. Eventually, I imagine, the issue will be resolved at least partly in favor of the resisters. The same Gallup poll that showed only 7 per cent of Americans favoring an outright amnesty found 63 per cent in favor of one with a service requirement. So the resolution to the debate is likely to come along the lines proposed by Senator Taft and his correspondent, Dr. Scott—amnesty in exchange for two or three years of alternative service, or a peacetime enlistment in the armed services. Such a resolution would not necessarily bring an end to the harsh feelings over amnesty, however. Many of the war resisters and their supporters scorn anything but an unconditional amnesty. Others reject even the notion of a formal amnesty on the grounds that amnesty implies they have committed wrongs whereas, in some resisters' eyes, the government is the offender for having brought the U.S. into an immoral and illegal conflagration to begin with.

As Commager pointed out in his Senate testimony on amnesty, "We come back always to . . . the war. . . . The material wounds are not as grievous as those inflicted by the Civil War—not for Americans anyway—but the psychological and moral wounds are deeper, and more pervasive." And the difficult issue of amnesty is bound to be caught up in the country's treatment of those wounds, either promoting their healing or quite possibly, keeping them raw and painful for a number of years to come.

9. FREEMAN,* HARROP A., "AN HISTORICAL JUSTIFICATION AND LEGAL BASIS FOR AMNESTY TODAY"

[Reprinted From *Law and the Social Order*, Arizona State Univ. Law Journal, vol. 1971, no. 3, 1971]

We live in a time of political activism, and we see men imprisoned for what, at least arguably, are "political crimes." Professor Freeman, convinced that America "cannot afford to 'banish' its potential leaders—those who ardently

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seek change as well as those who defend the status quo," asserts that amnesty is a proper method for society to forgive those acts that, although denominated criminal, are basically political. In this article he examines the concept of amnesty—its history, its relation to the pardon, when and by whom it may be granted—and concludes that the Congress and the President should take immediate steps to restore to full citizenship all "political prisoners."

Even a casual observer of the American political scene of recent years could hardly fail to wonder whether there has ever been a time in our history when the nation has been so divided, the opposition to a war been so widespread, the cry been so loud on the one hand for "law and order" and on the other that liberty is sacrificed and justice is dead. One wonders too if the courts and jails have ever been so full of persons who are, at least colorably, political protestors.¹

Today there may be more than 140,000 AWOL's and postinduction draft resistors, 100,000 men who failed to register or otherwise avoided the draft, and 35,000 civilians since the beginning of World War II who have been convicted in draft cases.² An untold number of soldiers have been disciplined for anti-war sentiments and activities; perhaps 200,000 people of all ages have been arrested and imprisoned or fined for antiwar marches demonstrations, and mobilizations—a sizeable number being tried or convicted for civil disobedience, burning of draft records, and like offenses; and other groups have been charged with offenses relating to support of groups such as the Black Panthers, or demonstrations at political conventions as in Chicago. All these offenses are, or are variously asserted to be, political offenses. They are all presently unamnestied and unpardoned. These are not in any sense ordinary criminals or those who refuse the duties of society or seek to save their own skins. We are talking about priests like Berrigan and Groppi, academics like Lynn, baby doctors like Spock, and the sons and daughters of the whole country—from middle America to Cabinet members. From a survey taken at Cornell, I would estimate that in the college community today (on which we must depend for future leadership) probably one in every three has in some way been involved in these "political crimes," or has been acquainted with someone who has. For many personally, or for their friends, conviction has actually taken away the right to participate in government.

I. A THESIS

The author would advance this thesis: Any nation, and particularly a democracy, needs all its best minds. It cannot afford to "banish" its potential leaders—those who ardently seek change as well as those who defend the status quo. Amnesty was devised as a method for society to forgive those whose acts were basically political, even though at the time society branded them as criminal, so that there should be constantly built the "nation . . . indivisible" to which we are dedicated by the Pledge of Allegiance.³

What are the grounds upon which those who dissent have been disabled by law from their civil rights? Some examples may assist. The Supreme Court has upheld the Selective Service provision that conscientious objectors must be "against war in any form,"⁴ although it is well known that Catholics distinguish between just and unjust wars, and Jehovah's Witnesses are against all war except Armageddon. Religion joins philosophy, as well as politics, as an

¹ The meaning of the term "political" is discussed and illustrated later in this article. See pages 529-33 *infra*. On the one hand, we cannot merely accept a defendant's statement that his act was political; on the other hand, we cannot accept the view that no felony can be political. (Perhaps we cannot even accept the idea that violence is nonpolitical, for revolution is generally recognized as political.) Tentatively, "political" should be used to refer to any acts, demonstrations, or statements which have the primary purpose of criticizing government policy or laws, bringing about governmental change, or seeking to gain control of government.

² These figures were compiled by the author from files of the Swarthmore Library Peace Collection, Central Committee for Conscientious Objectors, National Committee for Amnesty Now, and Committees in Canada, Japan, and Scandinavia. These estimates are similar to those currently being used by Senator Robert Taft, N.Y. Times, Jan. 8, 1972, at 29, col. 4-6; by the National Committee for Amnesty Now, statement issued Oct. 15, 1971; and to those reported in TIME, Jan. 10, 1972, at 17. See also page 519 *infra*. To take just one example, Pentagon figures indicate that in the first 10 months of fiscal year 1971 there were 68,449 desertions from the United States Army, or a rate of 62.6 per 1000 men, up nearly 20 percent from the 52.3 rate for fiscal year 1970. N.Y. Times, Aug. 15, 1971, § 4 (Week in Review) at 4, col. 7.

³ U.S.C. § 172 (1970).

⁴ *Gillette v. United States*, 401 U.S. 437 (1971).

impetus to dissent. Father Berrigan insisted upon burning draft records, arguing that "some property has no right to exist." Spock, Gregory, Dellinger, and nearly every other person claiming his crime, if any, was "political," have asserted first amendment rights.

Speech is precious to free men; but when exercised by a minority it may occasion political suspicion, which, in turn, may give rise to unsubstantiated criminal charges. It must never be forgotten that charges of the most severe nature are made against persons in high places during periods of great national stress. For example, President Truman was accused of treason by Senator Joseph McCarthy; and John L. Lewis was charged with "virtual treason" for refusing to settle a coal dispute.⁵ The Supreme Court upholds even overzealous criticisms of public institutions and figures, and has abolished the rule of seditious libel.⁶ Since 1967, over 4000 clergymen and laymen have counseled and aided conscientious draft refusers even though this may violate federal law.⁷ These men are lawyers, clergy, doctors—leaders who have acted upon their political beliefs. And we must not forget the warning of the late Justice Hugo L. Black:

"When [America] begins to send its dissenters . . . to jail, the liberties indispensable to its existence must be fast disappearing. . . .

* * * * *

" . . . There are grim reminders all around this world that the distance between individual liberty and firing squads is not always as far as it seems." ⁸

No matter where one stands in the political spectrum, it cannot be gainsaid that the American concept of government stands foremost for political freedom, whose handmaiden is the right of all to the public forum. If dissenters are denied their forum and their leaders, and (by civil disabilities and otherwise) their dignity and civil rights such as that to hold public office, then they are denied their American heritage, and America is denied their counsel. In the United States as elsewhere, the history of amnesty supports the thesis for amnesty. Once a major upheaval has crested, it is endemic in modern history among civilized governments to refuse to bear political grudges against those who, by reason of their political views alone, have sought to turn aside the juggernaut of a majority whom they sincerely believed to be wrong. As a society now experiencing the waning phase of one such an upheaval, Vietnam (even as others wax or wane), it behooves us to examine anew what history can contribute to a resolution of our urgent current problems, if we are to approach these with reasoned intelligence.

II. HISTORY OF AMNESTY—NON-AMERICAN

Amnesty is a public law concept, derived from the Greek *amnestia* (meaning *oblivion, intentional overlooking*—the same stem as *amnesia*). It is the act of the legal sovereign voluntarily extinguishing certain "criminal" acts against the state, and almost always involves political offenses. Some view it as a principle of international law that is binding on the sovereign, a kind of *jus gentium*.⁹

⁵ Russ, *Does the President Still Have Amnestying Power?* 16 Miss. L.J. 127, 127 (1944). The New York Times publication of The Pentagon Papers has been called virtual if not actual treason. N.Y. Times, June 17, 1971, at 18, col. 6.

⁶ *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). See *Time, Inc. v. Pape*, 402 U.S. 279 (1971); *Greenbelt Coop. Publ. Ass'n v. Bresler*, 398 U.S. 6 (1970); *New York Times Co. v. Sullivan*, 367 U.S. 254 (1964).

⁷ 50 U.S.C. App. § 462 (1970).

⁸ *Braden v. United States*, 365 U.S. 431, 444-46 (1961) (dissenting opinion).

⁹ At least one court has said that the term "properly belongs to international law. . . . [Amnesty applies] to rebellions which by their magnitude are brought within the rules of international law. . . ." *Knote v. United States*, 10 Ct. Cl. 397, 407 (1874). The international law book best known at the formation of America, and constantly referred to in the 1860-70 American discussions of amnesty said:

"It is much-discussed question whether the sovereign must observe the ordinary laws of war in dealing with rebellious subjects who have openly taken up arms against him. . . .

* * * * *

" . . . Subjects who rise up against their prince without cause deserve the severest punishment. But here, also, the number of the guilty forces the sovereign to show mercy. . . .

" . . . If they have revolted without cause . . . the sovereign must even then . . . grant amnesty to the greatest number of them." 3 E. de Vattel, "The Law of Nations" 336-40 (Fenwick transl. 1916).

Most historians view amnesty's clearest beginning in the act of Thrasybulus (403 B.C.), who, after the expulsion of the Tyrants from Athens, forbade further action against citizens for previous political acts, and required an oath of amnesty to erase all political strife from memory. There are other examples in the Greek period.¹⁰ In Roman law, the practice became common after attempts at political overthrow or intrigue, and was known as *restitutio in integrum*.¹¹

France has a long history of amnesties after virtually every civil strife. These were called *lettres de remission generale* or *lettres d'abolition*. Instances¹² include the truce between Armagnacs and Burgundians (1412),¹³ amnesties after the Bordeaux civil riots (1548),¹⁴ the Edict of Nantes (1598),¹⁵ nearly thirty examples between the Napoleonic imperial decree of 1802 and the amnesty of 1881 (following the Paris Commune and 1871 civil disturbances),¹⁶ and amnesties of persons convicted of war-related crimes in World War II and the Algerian war.¹⁷

With English history we begin to see both the importance of amnesty to Anglo-American law and the source of much of the confusion between pardon and amnesty, hereafter discussed.¹⁸ The most famous early amnesties were those granted in 1651 after the Civil War,¹⁹ in 1660 by Charles II²⁰ and in 1902 following the Boer War.²¹ Amnesties were also granted following World Wars I and II.²² The theory of pardons, remissions, and amnesties in Britain was that these were all "sovereign" powers, embodied in the King who had powers in many capacities: the King as executive, as judiciary, and the King in Parliament. Because all pardons, remissions, and amnesties were issued in the name of the King, little attention was paid to whether Parliament acted. Actually, in nearly every instance general amnesties were given by the King in Parliament.²³

The practice of amnesty is well developed in many other countries. In the first year following World War II, amnesties were granted to political prisoners in Argentina, Brazil, and Canada, and perhaps elsewhere in the Americas.²⁴ Similar action could be found in the same year in Bulgaria, Greece, India, Italy, the U.S.S.R., Yugoslavia, and other European countries.²⁵ In 1946, General MacArthur released nearly one million political prisoners in Japan,²⁶ and General Clay proclaimed an "amnesty" for over one million German political offenders under the age of 27.²⁷

Before turning to the American experience, we should take note of the size of the international problem and of the organization Amnesty International.²⁸ This London-based group has estimated that there are one-half million individuals in jail principally because of their beliefs: Jehova's Witnesses in Spain

¹⁰ A. Dorjahn, "Political Forgiveness in Old Athens" (1970); J. Bury, *A History of Greece* (rev. ed. 1951). In Biblical times a kind of amnesty was a part of the festival cycle; old grudges were forgiven every seventh year.

¹¹ See 1 *Encyclopaedia Britannica Amnesty* 8; 7 (1971); T. Mommsen, *Römisches Strafrecht* 457 (1955); G. Rein, *Kriminalrecht der Römer* 264 (1962).

¹² For greater detail the following works are of value: L. Cabat, "De l'Amnistie" (1904); P. Husson, "La Reserve des Droits des Tiers dans les Lois d'Amnistie" (1922); P. Prignon, "La Nouvelle Amnistie" (1920).

¹³ See generally 2 F. Guizot, "The History of France from the Earliest Times to 1848," at 207 (R. Black transl. undated).

¹⁴ See generally *id.* at 186-87.

¹⁵ See generally *id.* at 444-46; A. Maurois, "A History of France 167" (H. Binsse transl. 1956).

¹⁶ E.g., general amnesty of 1859 granted by Napoleon III for all political prisoners. 2 C. Guignebert, "A Short History of the French People 614" (F. Richmond transl. 1930).

¹⁷ See, e.g., 1 *Encyclopaedia Americana Algeria* 570 (1971).

¹⁸ See pages 524-27 *infra*.

¹⁹ Gagliardi, *Amnesty*, in *Encyclopaedia Glordicla Italiana* (1884).

²⁰ "An Act of Indemnity and Oblivion." P. Morrah, 1660: "The Year of Restoration 170" (1960); 1 *Encyclopaedia Britannica Amnesty* 808 (1971).

²¹ Treaty of Vereeniging, May 1902. 1 *Encyclopaedia Britannica Amnesty* 807 (1971).

²² *Id.* at 808.

²³ Dr. Groenvelt's Case, 91 Eng. Rep. 1038 (K.B. 1697), which had early said: "[A]s [the King] cannot but have the administration of public revenge, so he cannot but have a power to result it by his pardons. . . ." *Id.* at 1039. See also Gruff, *Some Historical Aspects of the Pardon in England*, 7 Am. J. Leg. Hist. 51 (1963).

²⁴ See generally R. Dawson, "The Government of Canada" (1963); J. Johnson, "Continuity and Change in Latin America" (1963); "Latin America" (N. Bailey ed. 1965).

²⁵ See 19 Current Dig. Sov. Practice 31 (Nov. 22, 1967); Int'l Communist Jurists Bull. 15-26 (Dec. 1964); 5 Inst. Study U.S.S.R. Bull. 40 (1958); 1 *Encyclopaedia Britannica Amnesty* 808 (1971).

²⁶ See generally Government Section, Supreme Commander Allied Powers, Political Reorientation of Japan (1946); K. Kawaii, "Japan's American Interlude" (1960).

²⁷ See generally 1 *Encyclopaedia Britannica Amnesty* 808 (1971).

²⁸ See Kahn, *The Meddlers*, New Yorker, Aug. 22, 1970, at 44-57.

intransigently opposed to military service, 1200 Greeks rounded up in the 1967 colonels' coup, several thousand persons in Ethiopia, perhaps 100,000 in Indonesia, and many others.²⁹ Amnesty International was formed in 1961 to help "prisoners of conscience." It called lawyers, political scientists, editors, labor leaders, philosophers, social workers, and like professionals to Utrecht for a colloquy on "The Boundaries of Freedom." By 1962 it was publishing a monthly, *Amnesty Action*, and a slick-cover journal, *Amnesty International*. It then began its first three missions to Ghana, Czechoslovakia, and Portugal. Many missions and 15,000 members later, Amnesty International has branches in nearly all countries and has helped to free over 2,500 individual prisoners.³⁰

III. AMNESTY IN THE UNITED STATES

United States History is replete with general "pardons" and "amnesties" for political offenses. After the Revolution, Congress restored their rights to those Loyalists who did not flee to Canada.³¹ On July 4, 1794, President Washington granted "pardons" to all who participated in the "Whiskey Rebellion."³² On May 21, 1800, President Adams gave a general pardon to "the late wicked and treasonable insurrection against the just authority of the United States of sundry persons in the counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania" (the so-called "House tax insurrection" of 1798).³³ In 1815, President Madison gave a general pardon for smuggling and similar offenses to the Barrataria Pirates of New Orleans.³⁴

We may skip over the intervening years and come to the Civil War. This period was marked by extensive amnesties, even for treason, and by conflict concerning whether the power to amnesty was congressional or Presidential.³⁵ Presidents Lincoln and Johnson were both much quicker to forgive insurgents than was Congress. In the Confiscation Law of 1862,³⁶ Congress had given the President power to "pardon and amnesty" those participating in the rebellion. Lincoln acted twice, Johnson four times. The Presidents accordingly labelled their actions as general pardons and amnesties. On December 8, 1863, Lincoln offered to recognize the government of any state in which 10 percent of the voters took the "oath of amnesty" included in the Proclamation. He referred both to his constitutional pardoning power and to Congress' delegation of the amnesty power, as the sources of his authority.³⁷ President Johnson, 3 years after the war's end, finally proclaimed "unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States . . ." ³⁸

Congress also was active. As we have said,³⁹ in 1862 it gave the President the right to "pardon and amnesty" those participating in the rebellion. After the war, Congress amnestied citizens of parts of Louisiana, and Representatives therefrom were received in the House.⁴⁰ Progressively broader amnesties were subsequently proposed in Congress;⁴¹ the most inclusive (all participants) was defeated in 1873.⁴² However, in 1872, Congress did enact a general amnesty bill which excepted only certain high officials,⁴³ at least on the theory

²⁹ *Id.* at 44.

³⁰ *Id.*

³¹ Although reprisals against the Loyalists were severe immediately following the Revolution, many regained their estates by 1789, and confiscatory laws were subsequently repealed. 1 *Encyclopaedia Britannica Loyalists (Tories)*, *America* 378 (1971). Other early examples include John Adams' amnesty to offenders in Fries' Rebellion of 1799, and then granted by James Madison to certain offenders in the War of 1812. 1 *Messages and Papers of the Presidents, 1789-1897*, at 303-04, 558-60 (J. Richardson comp. 1896) [hereinafter cited as J. Richardson].

³² J. Richardson, *supra* note 31, at 181.

³³ *Id.* at 303-04. Some exceptions to the pardon existed. 20 *Op. Att'y Gen.* 343 (1892).

³⁴ J. Richardson, *supra* note 31, at 558-60.

³⁵ See U.S. Const. art. II, § 2.

³⁶ Act of July 17, 1862, ch. 195 § 13, 12 Stat. 589, as amended, 12 Stat. 627 (1862).

³⁷ Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863). Cf. J. Fricklen, "History of Reconstruction in Louisiana 151" (1910).

³⁸ Proclamation No. 15, 15 Stat. 711, 712 (Dec. 25, 1868).

³⁹ See note 26 *supra*.

⁴⁰ J. Fricklen, *supra* note 37, at 180.

⁴¹ See J. Dorris, "Pardon and Amnesty Under Lincoln and Johnson" (1953).

⁴² *Id.* at 380.

⁴³ *Id.* at 375-79. During this period there were, however, amnesty bills enacted for the benefit of individuals, Act of June 19, 1868, ch. 62, 15 Stat. 360 (R. R. Butler of Tennessee); and persons in designated sections, Act of June 19, 1868, ch. 83, 15 Stat. 361 (about 1350 people).

that it had not delegated the total amnesty power to the President.⁴⁴ The first truly universal amnesty, which included the few remaining Civil War pariahs, was passed by Congress in 1898, after the Spanish-American War.⁴⁵

The Supreme Court did little⁴⁶ to resolve the question of power. In *Ex parte Garland*,⁴⁷ while nullifying test oaths for pardoned lawyers, the Court stated that the President could give a general pardon prior to conviction as well as after conviction, and blot out guilt as well as relieve from punishment.⁴⁸ But in fact the Presidential proclamation was under the amnesty power delegated by Congress in 1862,⁴⁹ as well as under this pardoning power. The issue could not be squarely faced while the 1862 delegation was in effect; Congress repealed it on January 7, 1867.⁵⁰ The earlier cases avoided the issues, and those after 1867 perhaps viewed the thirteenth, fourteenth, and fifteenth amendments, and the almost universal congressional amnesty of 1872, as retroactively eliminating the issue for the Civil War period.⁵¹

After the Civil War both the practice and the confusion between pardon and amnesty continued. By an Act of March 22, 1882, Congress provided:

"That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation before the passage of this act, on such conditions and under such limitations as he shall think proper"⁵²

⁴⁴ See J. Dorris, *supra* note 41, at 358-61. The Wade-Davis bill, containing the radical republican plan for reconstruction and including clemency provisions, was passed by Congress but vetoed by President Lincoln. Proclamation No. 18, 13 Stat. 744-45 (July 8, 1864). See Russ, *supra* note 5, at 127, 129-30 (interesting account of battle over amnesty between President and Congress).

⁴⁵ Act of June 6, 1898, ch. 389, 30 Stat. 432. President Johnson declared a universal amnesty for all those yet unpardoned on Christmas Day, 1868. See note 38, *supra*. J. Dorris, *supra* note 41, at 310-11. But congressional action did not include the highest officials, such as Jefferson Davis, until 1898. *Id.* at 387-391. One author indicates that Congress was concerned with relief from political disabilities, while the Presidential action effected "pardon" from crime. P. Buck, "The Road to Reunion 1865-1900," at 121-27 (1937). See generally K. Stampp, "The Era of Reconstruction 1865-1877" (1965). The following Presidential proclamations are also of interest: Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863); Proclamation No. 14, 13 Stat. 741 (March 26, 1864); Proclamation No. 37, 13 Stat. 737 (May 29, 1865); Proclamation No. 6, 15 Stat. 702 (July 4, 1868); and Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

⁴⁶ See pages 524-25 *infra*.

⁴⁷ 71 U.S. (4 Wall.) 33 (1867).

⁴⁸ This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy resposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. *Id.* at 380-81.

⁴⁹ See note 37 *supra*.

⁵⁰ Act of Jan. 21, 1867, ch. 8, 14 Stat. 377.

⁵¹ The cases and opinions of this period fall into these categories: (A) Lower court cases holding that early Presidential pardons applied not only to those in custody for treason but also to enemies in the field. *E.g.*, *United States v. Hughes*, 26 F. Cas. 420 (No. 15,418) (D.C.S.D. Ohio 1864). The issue never reached the Supreme Court and the rule was changed by Proclamation No. 14, 13 Stat. 741 (March 26, 1864). (B) Decisions holding that pardon or amnesty did not apply to things, such as vessels. *E.g.*, *The Gray Jacket* 72 U.S. (5 Wall.) 342, 367-68 (1866); 10 Op. ATT'Y GEN. 452 (1863); 11 Op. ATT'Y GEN. 455 (1866). (C) Decisions granting to loyal persons the right to recover property seized, or the cash proceeds thereof. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869); *Hamilton v. United States*, 7 Ct. Cl. 444 (1871). (D) Cases in which recovery of confiscated property was denied because of lapses in coverage or express exceptions in pardons, amnesties, or statutes. *Semmes v. United States*, 91 U.S. 21 (1875); *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1873). (E) Claims concerning forfeited realty and dealing with the vesting or nonvesting of property rights in other parties. *E.g.*, *Jenkins v. Collard*, 145 U.S. 546 (1893); *Illinois Cent. R.R. v. Bosworth*, 133 U.S. 92 (1890) (good review of cases); *Wallach v. Van Risdwick*, 92 U.S. 202 (1875). (F) Cases holding that proof of loyalty is not prerequisite to recovery by amnestied persons in the Court of Claims. *Pargoud v. United States*, 80 U.S. (13 Wall.) 156 (1871); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1871). Many of these cases discuss the question whether amnesty power lies in the President or in Congress. Although often in dicta only, the cases suggest that the Court was not sheltered from the issue—language concerning the Presidential power often seems almost gratuitously bold in his favor. See pages 527-30, *infra*.

⁵² Act of Mar. 22, 1882, ch. 47, § 6, 22 Stat. 30.

Such amnesties were thereafter proclaimed by the President.⁵³ The universal amnesty following the Spanish-American War was congressional.⁵⁴ President Wilson in effect pardoned a list of espionage agents after World War I.⁵⁵ President Coolidge remitted citizenship and civil rights to men who deserted the armed forces between the end of actual World War I combat and the formal termination of the war.⁵⁶ In 1933, Franklin D. Roosevelt granted a Christmas "full pardon" to all violators of the World War I draft laws and the 1917 espionage law.⁵⁷

Following the Draft Act of 1940,⁵⁸ we come to some of our most confusing history. Before Christmas 1945, President Truman granted a full pardon for all nonmilitary federal crimes to every honorably discharged World War II veteran.⁵⁹ He stated at that time that he was considering a general "amnesty," and almost immediately a Committee for Amnesty was formed, comprised of such well known persons as A. J. Muste, Dorothy Canfield Fisher, Henry Luce, Pearl Buck, Thomas Mann, Thornton Wilder, Harry Emerson Fosdick, Thurgood Marshall, and Frank Graham. In late 1946, President Truman appointed a "President's Amnesty Board,"⁶⁰ headed by Supreme Court Justice Roberts. A Gallup poll of January 28, 1947, showed 69 percent favoring amnesty and 23 percent opposed.⁶¹ Over 100 organizations representing most church, union, civil rights, and humanitarian groups, urged amnesty. The major newspapers editorialized for amnesty.⁶² Peculiarly, the President's Amnesty Board in effect resolved itself into a parole board. It considered the Selective Service violators on a case by case basis, ultimately recommending pardons in 1523 cases of obvious injustice (out of 15 to 20 thousand persons actually convicted). These individuals were then pardoned by the President in December 1947.⁶³ After that the Board ceased to function.⁶⁴ During the Korean War, in an action similar to President Coolidge's,⁶⁵ President Truman proclaimed pardons for all federal crimes to honorably discharged veterans who had 1 year of service after June 1950.⁶⁶ He also remitted citizenship and civil rights to all persons convicted of military desertion from August 14, 1945, to June 25, 1950.⁶⁷ There was again an organized move for amnesty in 1953, but nothing came of this.⁶⁸ No further amnesties nor general pardons have occurred since. So, literally, all the "political" prisoners not covered by the Roosevelt Proclamation of 1933;⁶⁹ all Selective Service violators of World War II, the Korean and Vietnam Wars, and the intervening periods; all persons convicted since 1933 of "political" crimes; and all persons who are subject to prosecution for any of these various types of crimes (unless covered by one of the pardons for honorably discharged veterans) are today unamnestied and effectively deprived of their right as citizens. Moreover, the country is deprived of their potential leadership.

⁵³ Congress authorized the President to give "amnesty," *id.*; President Arthur exercised this power case by case, and the courts viewed his action as "pardon," which carried with it the full congressional "amnesty." See *United States v. Bassett*, 5 Utah 131, 131-34, 13 P. 237, 238-39 (1887), *rev'd on other grounds*, 137 U.S. 496 (1890). Presidents Harrison and Cleveland later acted to proclaim No. 14, 28 Stat. 1257 (Sept. 25, 1894).

⁵⁴ See page 521 *supra*.

⁵⁵ Wilson commuted the sentences of some 50 people, including Eugene V. Debs, who had been convicted under the 191 Espionage Act. For most the result was a reduction in sentence, only one individual gaining a full reprieve of punishment. N.Y. Times, May 9, 1919, at 6 col. 4; *id.*, Dec. 31, 1921, at 4, col. 1. An interesting collection of materials on amnesty in World War I may be found in the New York City Public Library.

⁵⁶ Proclamation, 43 Stat. 1940 (Mar. 5, 1924).

⁵⁷ Proclamation, 48 Stat. 1725 (Dec. 23, 1933).

⁵⁸ Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

⁵⁹ Proclamation No. 2676, 3 C.F.R. 72 (Dec. 24, 1945).

⁶⁰ Exec. Order No. 9814, 3 C.F.R. 594 (Dec. 23, 1946).

⁶¹ Poll on file with Committee for Amnesty, 5 Beekman Place, New York, N.Y.

⁶² Washington Post, Dec. 25, 1947; N.Y. Herald Tribune, Dec. 25, 1947.

⁶³ Proclamation No. 2762, 3 C.F.R. 145 (Dec. 23, 1947).

⁶⁴ In the Proclamation establishing the Board, *supra* note 57, it was provided that the Board would cease to function after it presented its recommendations to the Attorney General. It did so on December 23, 1947. Some action in quest of amnesty continued. See, e.g., N.Y. Times, Dec. 26, 1947, at 18, col. 3; *id.*, Feb. 9, 1948, at 20, col. 3.

⁶⁵ See page 523 and note 56 *supra*.

⁶⁶ Proclamation No. 3000, 3 C.F.R. 175 (Dec. 24, 1952).

⁶⁷ Proclamation No. 3001, 3 C.F.R. 175 (Dec. 24, 1952).

⁶⁸ To the author's knowledge, the following amnesty campaigns occurred: Committee for Amnesty, 1945-47; Central Committee for Conscientious Objectors, 1949; Central Committee for Conscientious Objectors and American Friends Service Committee, 1953-54; War Resisters League and others, 1945, 1951, 1956; Amnesty International, 1961.

⁶⁹ See page 523 *supra*.

IV. AMNESTY AND PARDON DISTINGUISHED

As can be seen from the above review there has been considerable confusion between pardon and amnesty, particularly by laymen and by Presidents in their attempts to assert power. But it does not appear to this writer that there is or should be any legal confusion.

In *Burdick v. United States*,⁷⁰ the Supreme Court defined the concept of amnesty, in comparison to pardon, as follows:

"The one [amnesty] overlooks offense; the other [pardon] remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State. Amnesty is usually general, addressed to classes or even communities, a legislative act or under legislation, constitutional or statutory, the act of the supreme magistrate."⁷¹

In *United States v. Bassett*,⁷² a case involving congressional authorization for the President to grant amnesty for the practice of bigamy, the Court said:

"The word 'Amnesty' is defined thus: 'An act of oblivion of past offenses, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period.'

"A pardon relieves an offender from the consequences of an offense of which he has been convicted, while amnesty obliterates an offense before conviction; and in such case, he stands before the law precisely as though he had committed no offense. And while the term 'pardon' was used by the president, it had the effect of amnesty."⁷³

The *Encyclopedia of the Social Sciences* distinguishes the juridical aspects and reports the President-Congress confusion:

"Amnesty is usually held to be juridically different from pardon in that it involves no nullification of a penalty already judicially determined in particular cases, but is a general determination that whole classes of offenses and offenders will not be prosecuted. Normally amnesty is carried into effect by statute rather than by executive order, unless a devolution of the power upon the executive has been granted, under a survival of executive prerogative such as exists in England and Italy and perhaps one may say, in the United States. Joseph-Barthelemy almost alone believes that amnesty, because it involves discretion, is an executive act and for that reason, under the French system, ought to be accorded by the parliament (not as a legislative power but as representative of the nation) but on the exclusive initiation of the government. Others have held that it proceeds ultimately from the highest source of legislative authority, existing in the crown under constitutional monarchies, in the representative body under parliamentary republics. Owing to a refusal on the part of American courts to differentiate amnesty from pardon, the power is found both in president and in Congress under the constitutional allocation of powers in the United States.

"For purposes of formal classification amnesties may be said to be: first, general or particular, that is, they may cover all classes of political offenders or may be limited to special groups, with specific exceptions; and second, absolute or conditional, that is, they may impose no conditions or they may demand the performance of certain conditions before their provisions enter into legal effect."⁷⁴

*State v. Blalock*⁷⁵ is often taken as the classic statement in the state courts:

"Pardon and amnesty are not precisely the same. A pardon is granted to one who is certainly guilty, sometimes before, but usually after conviction, and the court takes no notice of it, unless pleaded, or claimed by the person pardoned; and it is usually granted by the crown or by the executive. But amnesty is to those who may be guilty, and is usually granted by Parliament, or the Legislature; and to whole classes, before trial. Amnesty is the abolition or oblivion of the offense; pardon is its forgiveness."⁷⁶

⁷⁰ 236 U.S. 79 (1915).

⁷¹ *Id.* at 95.

⁷² 5 Utah 131, 13 P. 237 (1887), *rev'd on other grounds*, 137 U.S. 496 (1890).

⁷³ *Id.* at 133, 13 P. at 239 (citations omitted).

⁷⁴ W. Elliott, *Amnesty* in 2 *Encyclopedia of the Social Sciences* 36-37 (E. Sellgman & A. Johnson eds. 1930) (citations omitted).

⁷⁵ 61 N.C. 199 (1867).

⁷⁶ *Id.* at 202-03. See also *State ex rel. Anheuser-Busch Brewing Ass'n. v. Eby*, 170 Mo. 497, 524, 71 S.W. 52, 61 (1902); *In re Briggs*, 135 N.C. 118, 145-46, 47 S.E. 403, 411 (1904) (concurring opinion).

Federal cases generally recognize the following principle features of amnesty: (a) oblivion, (b) for past offenses (c) usually in favor of classes of persons, (d) who may not already have been convicted, (e) for generally political act(s) against the sovereign, (f) as a matter of legislative grace.⁷⁷ The federal and state pardon cases are also helpful in clarifying the definitional problem. Pardon is considered a "remission of the punishment,"⁷⁸ which erases any imposition of punishment but does not negate the offense itself,⁷⁹ although a few cases say it is a remission of "guilt."⁸⁰ Since pardon exempts a person from the punishment, it properly proceeds from the one required to enforce penalties—the executive.⁸¹ Pardon is individual, and it must be accepted by the beneficiary as he would a deed or grant.⁸² Acceptance of a pardon admits guilt, in exchange for the remission of penalties.⁸³ Sometimes the courts try to distinguish between a pardon and a "full pardon." The latter is said to equal an amnesty and blot out the offense as well as the punishment,⁸⁴ but such statements are often dicta. Confusingly, in cases of this type, and on occasion, in others, the courts may say that pardon both wipes out the conviction and restores civil rights.⁸⁵

V. AUTHORITY TO GREAT AMNESTY AND PARDONS IN THE UNITED STATES

It can be fairly readily ascertained that the power to *pardon* is only in the President. The United States Constitution provides: "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."⁸⁶ Early English history, from which we derive our theories of government, and the general history of pardon,⁸⁷ confirm that pardon is an executive function. The Supreme Court has recognized that "[t]his [pardon] power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."⁸⁸ This is so even though there were,

⁷⁷ *E.g.*, *Brown v. Walker*, 161 U.S. 591, 601-02 (1896). Useful comparisons are *United States v. Hughes*, 175 F. 238, 242 (D.C.W.D. Penn. 1892), *aff'd for want of prosecution*, 154 U.S. 505 (1893) (number of persons affected differentiates pardon and amnesty); *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833) (pardon).

⁷⁸ *State v. Brinkley*, 354 Mo. 1051, 1073-74, 193 S.W. 2d 49, 58 (1946); *Moore v. State*, 43 N.J.L. 203, 241 (1881).

⁷⁹ *United States v. Swift*, 186 F. 1002, 1017 (1911); *In re Spenser*, 22 F. Cas. 921, 922 (No. 13,234) (C.C.D. Ore. 1878); *Hughes v. State Bd. of Health*, 348 Jo. 1236, 1241, 159 S.W. 2d 277, 279 (1942); *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 138-40, 38 N.E.2d 468, 471-72 (1941). Some say a pardon cannot be granted until after sentencing. *E.g.*, *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 375, 26 N.E.2d 190, 194 (1940). *But see* note 47 *supra*, and note 84, *infra*.

⁸⁰ *E.g.*, *Ex parte Griland*, 71 U.S. (4 Wall.) 333, 380 (1866); *United States ex rel. Palermo v. Smith*, 17 F.2d 534, 535 (2d Cir. 1927); *United States ex rel. Forino v. Garfinkel*, 69 F. Supp. 846, 848 (W.D. Pa. 1947), *rev'd on other grounds*, 166 F.2d 887 (3d Cir. 1948); *State ex rel. Collins v. Lewis*, 111 La. 693, 695, 35 So. 816, 817 (1904). *See* note 47 *supra*, and 81 *infra*.

⁸¹ *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833); *George v. Lillard*, 106 Ky. 820, 823, 51 S.W. 793, 794 (1899); *Rich v. Chamberlain*, 104 Mich. 436, 440-41, 62 N.W. 584, 585 (1895); *State v. Stern*, 210 Minn. 107, 110, 297 N.W. 321, 323 (1941); *State ex rel. Stewart v. Blair*, 356 Mo. 790, 794-95, 203 S.W. 2d 716, 718 (1947); *State v. Jacobson*, 348 Mo. 258, 260-61, 152 S.W.2d 1061, 1063 (1941); *Ex parte Campion*, 79 Neb. 364, 370-73, 112 N.W. 585, 588 (1907); *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 135-37, 38 N.E. 2d 468, 470-71 (1941); *Roberts v. State*, 30 App. Div. 106, 51 N.Y.S. 691, 692 (1898), *aff'd*, 160 N.Y. 217, 54 N.E. 678 (1899); *People ex rel. Benton v. Court of Sess.*, 8 N.Y. Crim. 355, 359-61, 19 N.Y.S. 508, 510 (Sup. Ct. Monroe County, 1892); *State v. Peters*, 43 Ohio St. 629, 650, 4 N.E. 81, 87 (1885); *Ex parte Ridley*, 3 Okla. Crim. 305, 354-56, 106 P. 549, 551 (1910); *Ex parte Miers*, 124 Tex. Crim. 592, 594-96, 64 S.W.2d 778, 780 (1933); *Ex parte Rice*, 72 Tex. Crim. 587, 593-95, 162 S.W. 891, 899 (1913).

⁸² *Burdick v. United States*, 236 U.S. 79, 91 (1915); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161-61 (1883).

⁸³ *State v. Jacobson*, 348 Mo. 258, 261, 152 S.W.2d 1061, 1063 (1941); *Jones v. State*, 141 Tex. Crim. 70, 73-74, 147 S.W. 2d 508, 510 (Ct. Crim. App. 1941); *State v. Culen*, 14 Wash. 2d 105, 109, 127 P.2d 257, 259 (1942).

⁸⁴ *E.g.*, *United States v. Athens Armory*, 24 F. Cas. 878, 884 (No. 14,473) (N.D. Ga. 1866); *Randall v. State*, 73 Ga. App. 354, 376, 36 S.E.2d 450, 463 (1945), *cert. denied*, 329 U.S. 749 (1946); *Ex parte Jones*, 25 Okla. Crim. 347, 350, 20 P. 978, 979 (1923); *Warren v. State*, 127 Tex. Crim. 71, 74, 74 S.W.2d 1006, 1008 (1934).

⁸⁵ *Knote v. United States*, 95 U.S. 149, 153 (1877); *Taran v. United States* 266 F.2d 561, 566 (8th Cir. 1959); *Groseclose v. Plummer*, 106 F.2d 311, 313 (9th Cir. 1939); *Vereneco, Inc. v. Fidelity & Cas. Co.*, 253 La. 721, 724, 219 So.2d 508, 511 (1969); *State ex rel. Herman v. Powell*, 139 Mont. 583, 588-89, 367 P.2d 533, 556 (1961); *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 584-86, 28 A.2d 897, 899-900 (1942).

⁸⁶ U.S. Const. art. II, § 2.

⁸⁷ *See* history, page 519 and pages 520-24 *supra*.

⁸⁸ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

in effect, legislative pardons prior to our Constitution,⁸⁹ and some states have continued to use them.⁹⁰

One constitutional question still remains open. As shown in the section above,⁹¹ the generally accepted theory of pardon is that it assumes that guilt has been proved and punishment imposed; pardon may be granted only *after* a conviction. It can be argued on behalf of the President, on the other hand, that the Constitution uses the word "offenses," not "crimes," and "offenses" can refer as well to preconviction cases. There is some support for such a distinction between offenses and crimes in the cases defining these terms,⁹² but it is weak and many cases fail to mention any such distinction.⁹³ The Supreme Court has expressly refused to consider this pre- versus postconviction question concerning the Presidential pardoning power,⁹⁴ and the issue remains to be resolved.

We have pointed out some attempts in the cases to define a "full and complete" or "general" pardon as nearly the equivalent of amnesty,⁹⁵ but this writer can find neither authoritative nor modern Supreme Court acceptance of such a view.

It is submitted that the power of *amnesty* belongs only to the United States Congress.⁹⁶ The *Encyclopedia of the Social Sciences* shows this to be a view accepted by scholars.⁹⁷ The only law review article to date which faces the question, takes as its thesis that Congress alone has the amnestying power.⁹⁸

The original Constitution did not expressly place the amnesty power. It is the general rule that in such situations it rests where it would under the then british system,⁹⁹ or in the people under the ninth and tenth amendments to the Constitution.¹⁰⁰ If anyone can exercise it on their behalf, it is their representatives in Congress. The one place in the Constitution where the matter is *now* mentioned is in the fourteenth amendment (adopted after the President-Congress conflict of the Civil War), which clearly recognizes that the power to amnesty lies with the Congress.¹⁰¹ The early Presidential actions were either pardons in fact, or were taken under express congressional delegation of the amnestying power.¹⁰²

⁸⁹ *E.g.*, prerevolution writs of amnesty issued by the Maryland legislature. J. McSherry, "History of Maryland" 62-63 (1904) (pardon agreement between Puritans and Catholics, Mar. 22, 1658).

⁹⁰ *See, e.g.*, State v. Nichols, 26 Ark. 74 (1870); State *ex rel.* Witter v. Forkner, 94 Iowa 1, 62 N.W. 772 (1895); State v. Bowman, 145 N.C. 452, 59 S.E. 74 (1907).

⁹¹ *See* pages 524-26 *supra*.

⁹² *See Ex parte Grossman*, 267 U.S. 87, 120 (1925); *In re Opinion of Justices*, 301 Mass. 615, 17 N.E. 2d 906 (1938); State v. Brantley, v Ohio St. 2d 139, 205 N.E. 2d 391 (1965). *See also*, United States v. Witherspoon, 110 F. Supp. 364 (E.D. Tenn. 1953), *modified*, 211 F.2d 858 (6th Cir. 1954); W.J. Dillner Transfer Co. v. International Bhd. of Teamsters, 94 F. Supp. 491 (W.D. Pa. 1950); People v. Phillips, 284 N.Y. 235, 30 N.E.2d 488 (1940).

⁹³ *E.g.*, Pendergast v. United States, 317 U.S. 412 (1943); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); State v. Slowe, 230 Wis. 406, 284 N.W. 4 (1939).

⁹⁴ *Burdick v. United States*, 236 U.S. 79, 93 (1915).

⁹⁵ *See* note 84 *supra*.

⁹⁶ *See* the historical section, pages 517-24 *supra*, for a discussion of the many examples of legislative amnesty.

⁹⁷ *See* page 525 *supra*.

⁹⁸ Russ, *supra* note 5, at 127.

⁹⁹ *See Ex parte Wells*, 59 U.S. (18 How.) 307, 310-11 (1955). Traditionally, amnesty was considered the King's prerogative, although restrictions were placed on his arbitrary use of it. *Id.* at 310-12.

¹⁰⁰ The text reads:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.
U.S. CONST. amend. IX. Furthermore:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
Id. amend. X. The Supreme Court has said:

Although the power to grant reprieves and pardons may be vested in the President, this has never been held to take from the legislature the power to pass acts of general amnesty.

Brown v. Walker, 161 U.S. 591, 601 (1896).

¹⁰¹ The text reads:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.

U.S. CONST. amend. XIV, § 3.

¹⁰² *See* pages 520-24 *supra*.

Subsequent to the Civil War, as the historical review shows, Congress and the President have generally respected this division of power.¹⁰³ Thus Congress authorized an amnesty to the Mormons for bigamy,¹⁰⁴ which was later proclaimed by the Executive.¹⁰⁵ When Presidents Wilson, Coolidge, and Roosevelt forgave offenses, they were properly acting under their pardoning power and used the word "pardon."¹⁰⁶ President Truman created an "Amnesty Board" in 1946 but in fact it recommended pardons to him and he granted pardons. The same is true of all Presidential actions regarding World War II and the Korea War.¹⁰⁷

It therefore seems clear that the President is empowered to grant *pardons* for all past offenses for which an *individual* has been convicted, and perhaps for those for which he has not been convicted and on which the statute of limitations on prosecution has not run, while Congress has the farther reaching prerogative to grant *amnesties* for all political activity.

Many of our political offenders have been prosecuted or threatened with prosecution under state laws of trespass, unlawful assembly, and the like. Can the United States (President and Congress) pardon or amnesty these state offenders? It is submitted that to the extent that a state conviction punishes one for acts against the federal government (*e.g.*, destruction of draft files), the President and Congress do have such power.¹⁰⁸ They also may have it where the state conviction prevents exercise of federal rights, such as voting.¹⁰⁹ It is even arguable that the only "sovereignty" in the United States is that of the United States, and the States are merely allowed to exercise certain aspects thereof, so that Congress and the President may exercise complete powers of amnesty and pardon over the effects of *all* state offenses, since it is federal law which removes federal rights upon a state conviction.¹¹⁰

VI. OFFENSES FOR WHICH AMNESTY CAN BE GRANTED

One way to approach this question is to say that it is "political" offenses for which amnesty can be granted and then inquire what "political" means. But this approach presents us with a dilemma because crimes are the unique province of the courts, yet the courts refuse to consider political issues.¹¹¹ Hence using the term "political crimes" is like trying to mix oil and water. But the dilemma may be more apparent than real, for it may be the courts' refusal to consider the political nature of an offense that requires the offender to seek amnesty from the legislative or executive branch.¹¹²

Or we may turn to general definitions of "political." Here, the wide range of uses of the word—political issue, office, matter, party, organization, and the like—makes the definitions of little help. One does gather that anything is

¹⁰³ When a president questioned Congress' action he did so because Congress limited his "prerogative of pardon." President Johnson's Farewell Address, Mar. 4, 1869, in *THE AMERICAN ANNUAL CYCLOPEDIA* 591 (1869).

¹⁰⁴ Act of Mar. 22, 1882, ch. 47, § 6, 22 Stat. 30.

¹⁰⁵ Proclamation No. 42, 27 Stat. 1058 (Jan. 4, 1893); Proclamation No. 14, 28 Stat. 1257 (Sept. 25, 1894).

¹⁰⁶ See page 523 *supra*.

¹⁰⁷ See pages 523-24 *supra*.

¹⁰⁸ See *Hamm v. City of Rock Hill*, 379 U.S. 306, 314-67 (1964) (in passing the Civil Rights Act, Congress validly exercised power to abate prior state prosecutions in lunch-counter cases).

¹⁰⁹ *Id.*

¹¹⁰ See *In re Bocchiaro*, 49 F. Supp. 37 (W.D.N.Y. 1943); 10 Op. ATT'Y GEN. 122 (1864).

¹¹¹ The rule has not been substantially altered by the Wechsler-Bickel debate. Compare Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), with Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Nor has it been dislodged by the liberalizing cases of *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Powell v. McCormack*, 395 U.S. 486 (1969); and their progeny. Many law review articles so indicate. *E.g.*, Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517 (1966).

¹¹² Also of interest is the refusal of the Supreme Court to adjudicate the legality of the war in Vietnam, involved in many of the offenses we are considering. *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Velvel v. Nixon*, 396 U.S. 1042 (1970); *McArthur v. Clifford*, 393 U.S. 1002 (1968); *Hart v. United States*, 391 U.S. 956 (1968); *Holmes v. United States*, 391 U.S. 936 (1968); *Mora v. McNamara*, 389 U.S. 934 (1967); *Miller v. United States*, 389 U.S. 930 (1967). Compare *Velvel, The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968), with Note, *Congress, the President and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968). See also *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970) (refusal to allow religious scruples as a defense to payment of war taxes); F. WORMUTH, *THE PRESIDENT VERSUS THE CONSTITUTION* (1968).

"political" which pertains to the policy of government or to any group of persons holding similar beliefs who strive to gain control of government or general adoption of their own programs. At the same time there is an attempt to restrict the term to orderly processes and rule out revolution.¹¹³ A recent case¹¹⁴ holds that citizen protest marches are "political" under the Hatch Act¹¹⁵ and Civil Service regulations.¹¹⁶

But these definitions become wholly inadequate when we look at the deportation and extradition statutes and cases, the only place the federal law seems to define "political crimes" explicitly. The Refugee Relief Act of 1953¹¹⁷ and the Displaced Persons Act of 1948¹¹⁸ permit stay of deportation and acquisition of immigrant status if return to the country of former residence would cause political persecution or fear of persecution. This turns out to be persecution of account of race, religion, or political beliefs or activity.¹¹⁹ The extradition statutes, treaties and cases are even more helpful. "Political offenses" are not cause for extradition, whether there has been a conviction or a mere charge, and this is so because the United States should not permit its legal process to be used by a foreign government for reprisals against its political opponents.¹²⁰ To defeat extradition for murder or other violent crimes, it is necessary for the accused to prove that he was part of a revolutionary movement, or that the occurrence was part of a political uprising or opposition.¹²¹ Giving orders to kill during a war (and presumably refusing orders to kill or participate in war acts) is a political crime,¹²² as is treason.¹²³ There is some indication that such acts as going to another country or claiming foreign citizenship to avoid required military service are political.¹²⁴

But it is the historical examples of the use of amnesty that seem determinative. Amnesty has been used to erase treason, insurrection, attempted political overthrow, tax refusal, civil and racial strife, draft avoidance, army desertion, disloyalty, espionage, and even bigamy, polygamy, and murder,¹²⁵ particularly when these arise from political-racial-religious claims of necessity.¹²⁶

Every class of offense listed at the beginning of this article¹²⁷ and claimed by the participants to be political seems to be within one of the above definitions and examples. And the participants—Angela Davis, Panthers Seale and Newton, the Berrigans, the San Francisco Stockade "mutineers," the Catonville Nine, Chicago Seven, Milwaukee Fourteen, New Jersey Eight, the AWOL's and deserters, the draft evaders and avoiders, those arrested for trespass, riot, and other acts in Washington, D.C., mobilizations and sit-ins, even the Attica

¹¹³ General definitions: *Moser v. United States*, 341 U.S. 41 (1951); *People v. Morgan*, 90 Ill. 558 (1878); *In re Stilwell Political Club*, 17 N.Y. 2d 574, 215 N.E.2d 5121 109 N.Y.S.2d 331 (Sup. Ct. 1951). Excluding revolution: *Pockman v. Leonard*, 39 Cal. 2d 676, 249 P.2d 267 (1952), *appeal dismissed*, 345 U.S. 962 (1953); *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 171 P.2d 21 (1946).

¹¹⁴ *Holden v. Finch*, 446 F.2d 1311 (D.C. Cir. 1971).

¹¹⁵ 18 U.S.C. §§ 594-95, 598, 600-01, 604-05, 608-09, 611-12 (1970).

¹¹⁶ *E.g.*, 5 C.F.R. § 315 (1971), 18 U.S.C. § 59 (1970).

¹¹⁷ 67 Stat. 400 (1953).

¹¹⁸ 62 Stat. 1009 (1948), *as amended*, 64 Stat. 219 (1950).

¹¹⁹ *See* 50 U.S.C. App. § 1971 (d); 8 U.S.C. §§ 1101, 1253(h) (1970). *Cheng Fu Sheng v. Barber*, 269 F.2d 497 (9th Cir. 1959); *Cheng Lee King v. Carnahan*, 253 F.2d 893 (9th Cir. 1958); *Application of Paktorovics*, 156 F. Supp. 813 (S.D.N.Y. 1957), *rev'd*, 260 F.2d 610 (2d Cir. 1958); *Ex parte Kurth*, 28 F. Supp. 258 (S.D. Cal.), *appeal dismissed*, 106 F.2d 1003 (9th Cir. 1939). Court review of executive action is very narrow: *Schieber v. United States Immig. & Nat. Serv.*, 427 F.2d 1019 (2d Cir. 1970); *Hamad v. United States Immig. & Nat. Serv.*, 420 F.2d 645 (D.C. Cir. 1969); *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963); *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961); *MacKay v. McAlexander*, 268 F.2d 35 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960).

¹²⁰ 18 U.S.C. § 3184 (1970); *e.g.*, *In re Extradition of Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); *Treaty with Venezuela on Extradition*, Jan. 19, 21, 1922, 43 Stat. 1698, T.S. No. 675; *Treaty with Dominican Republic on Extradition*, June 19, 1909, 36 Stat. 2468, T.S. No. 550; *Treaty with Switzerland on Extradition*, May 14, 1900; 31 Stat. 1928, T.S. No. 354; *Treaty with Mexico on Extradition*, Feb. 22, 1899, 31 Stat. 1818, T.S. No. 242. There are nearly 100 other like treaties.

¹²¹ *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *In re Extradition of Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959).

¹²² *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated*, 355 U.S. 393 (1958).

¹²³ *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918, *rehearing denied*, 336 U.S. 947 (1949).

¹²⁴ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Moser v. United States*, 341 U.S. 41 (1951).

¹²⁵ *See* pages 518-24 *supra*.

¹²⁶ *See* notes 117-124 *supra*.

¹²⁷ *See* page 515, *supra*.

prison revolters—all claim to have engaged in law violations (if any) to press the government to get out of an erroneous or illegal war, change foreign policy, give up racial suppression, or end practices leading to disenfranchisement.

It may be desirable to ask the question in another way: What criteria might be used to determine which "crimes" are "ordinary" (not to be amnestied) and which are "political" (to be amnestied)? It is submitted that the following are the more important considerations:

(1) Has the position for which the prisoner stood now become generally accepted in the community?¹²⁸

(2) Has the government activity against which protest was made, been ended?¹²⁹

(3) Was the action taken originally as an expression of religion, conscience, or other first amendment right?¹³⁰

(4) Were the conditions (prison, race police activity) such obvious failings of government that the citizenry ought to be encouraged to speak out?¹³¹

(5) Does the policy of the government against which protest was made (*e.g.*, the war) represent a relatively small political group imposing its will upon the citizenry without a clear mandate, thus lacking democratic sanction and bound to elicit protest?¹³²

(6) Was the original action nonviolent and therefore nearest to protection as free speech?¹³³

(7) Was the crime one generally condemned by all society as against the peace and good order of the people, with few or no political overtones?¹³⁴

(8) Was the so-called political position taken that of anarchy?¹³⁵

(9) Even if the original crime for which a person is in jail was nonpolitical, has the matter of confinement turned into a political imprisonment or harassment?¹³⁶

(10) Can society expect no serious threat if it releases the prisoners?¹³⁷

It seems quite possible to this writer to formulate proper criteria along these lines, and to set up a board if necessary to sort out borderline cases. The bugaboo argument of "would you release all criminals?" has little relevance.

VII. CONCLUSION

As was pointed out earlier, never in United States history has the problem seemed so large and important. We now have a huge number of unamnestied and unpardoned political offenders—many of whom may be our finest young

¹²⁸ For example, public support of official actions in Vietnam has markedly waned. In vored bombing North Vietnamese industrial plants and factories. Overall, 50 percent apparently March of 1966, a poll of the adult American population showed 61 percent favored President Johnson's handling of the Vietnam situation, and 33 percent were opposed, according to the Gallup Political Index, Feb. 1966, No. 9, at 5-6. But in a poll taken between November 14 and 16, 1969, it appeared that 64 percent of the adult American population approved the way President Nixon was handling the Vietnam situation (Vietnamization and withdrawal of troops). Gallup Opinion Index, Dec. 1969, No. 54, at 2. On the campuses, the polls said that in January 1970, 69 percent of the students polled were in favor of reducing our military effort in Vietnam, while 20 percent favored increased military action. Gallup Opinion Index, Jan. 1970, No. 55 at 19. See note 142, *infra*.

¹²⁹ Typical are amnesties after a war for draft avoiders, AWOL's, and like persons. See pages 529-24 *supra*.

¹³⁰ See Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958). Prosecution tends to show a restrictive first amendment application under hysteria conditions.

¹³¹ This would cover demands for amnesty in prison uprisings, and racial issues of nearly every kind.

¹³² As a part of this it would be proper to consider what position Congress had itself expressed.

¹³³ See the author's various articles on Civil Disobedience: Freeman, *The Right of Protest and Civil Disobedience*, 41 IND. L.J. 228 (1965); Freeman, *Moral Preemption Part I: The Case for the Disobedient*, 17 HAST. L.J. 425 (1966); Freeman, *Civil Disobedience, Law and Democracy*, 3 LAW TRANS. 13 (1966); Freeman, *Civil Disobedience and the Law*, 21 RUT. L. REV. 17 (1966). See also Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965).

¹³⁴ Murder, robbery, felonious assault, and like crimes are of this nature—even if the prisoner claims his repressed and societally produced background is responsible. On the other hand, "normal" criminal statutes, such as trespass and disorderly conduct, can be used for criminal suppression.

¹³⁵ It may be too much to ask the government to free a person constantly trying to overthrow all government.

¹³⁶ There are those who feel that the Angela Davis, Soledad Brothers, Jackson, and Seale cases have become "politicized." TIME, Sept. 6, 1971, at 18.

¹³⁷ This would certainly apply to most conscientious objector and Jehovah's Witness cases.

people and potential leaders. The offenses are backed up all the way to World War I and II. Nowhere else in the world are political offenders treated as common criminals. Even in Greece and some of the most dictatorial countries, they are placed under house arrest or allowed to move to another country. In most noncommunist countries they are amnestied and allowed to try again for political power.¹³⁸ We need immediately to erase this blot on American democracy. Even more we need to recruit these critics of society back into the political process of changing society, as most everyone recognizes society needs changing. At Attica, Commissioner of Corrections Oswald admitted that 28 of the 30 prisoner demands should be implemented.¹³⁹ It may be small satisfaction to the Berrigans and other antiwar "criminals," but there is now general political agreement on the error of the Vietnam war. Rosa Park's feet and the busted head of many a demonstrator may hurt no less, but desegregation is becoming a reality. The nation has a profound interest in allowing reformists a radical means of shaking us from our lethargy. The more rapid the need for reform, the more radical must be the means of getting public attention and action.

Senator Edward Kennedy has introduced a bill as an alternative to further Selective Service extension which proposes an amnesty "study" for Congress.¹⁴⁰ Senator Taft introduced an amnesty bill on December 14, 1971,¹⁴¹ and popular support for amnesty is strong.¹⁴² This is a start, but it is not enough. Congress and the President should appoint a Joint Committee to study the whole problem of pardon and amnesty, and recommend immediate action to wipe out all "political offenses" and return all these citizens to where they are needed, in "One Nation . . . Indivisible, with Liberty and Justice for all."¹⁴³

10. JONES, DOUGLAS AND RAISH, DAVID, "AMERICAN DESERTERS AND DRAFT EVADERS: EXILE, PUNISHMENT OR AMNESTY?"

[Reprinted From Harvard International Law Journal, vol. 13, p. 88, 1972]

INTRODUCTION

At this news conference of November 12, 1971, President Nixon was asked the following:¹

Mr. President, do you foresee granting amnesty to any of the young men who have fled the United States to avoid fighting in a war that they consider to be immoral?

The President's answer was, "No." Whatever the implications of this brief response, and whatever the motivations of these "young men," the phenomenon of large numbers of draft-age Americans, including American servicemen, fleeing to foreign countries has emerged as an issue of national concern.² This

¹³⁸ Big Minh was amnestied in South Vietnam. In September, 1970, even Franco of Spain amnestied hundreds of political prisoners.

¹³⁹ Commissioner Oswald is reported to have acceded to all but two of the demands in the early stages of the Insurgency. *TIME*, Sept. 27, 1971, at 22.

¹⁴⁰ S. 483, 92d Cong., 1st Sess. (1971).

¹⁴¹ S. 3011, 92d Cong., 1st Sess. (1971).

¹⁴² See, e.g., *NEWSWEEK*, Jan. 17, 1972, at 19. A recent Gallup poll indicated in part that, when asked about amnesty conditioned on alternative service such as that presently required for conscientious objectors, 71 percent of those polled favored amnesty generally, while 22 percent were against it, and 7 percent had no opinion. Of the 71 percent in favor of amnesty, 63 percent favored the condition, while 7 percent were for amnesty without qualification; 1 percent said they were proamnesty, but uncertain about required service. The poll also found that 49 percent favored amnesty for Army Lieutenant William Calley, convicted in the My Lai affair, while 24 percent were opposed. *Id.* at 20.

¹⁴³ Pledge of Allegiance, 36 U.S.C. § 172 (1970).

¹ *N.Y. Times*, Nov. 12, 1971, at 10, col. 4.

² It is not known precisely how many American deserters and draft evaders are presently living abroad. Estimates vary widely, e.g., *N.Y. Times*, Feb. 5, 1970, at S. col. 4 (6,000-60,000); *Newsweek*, Feb. 15, 1971, at 28 (50,000-70,000). A number of unofficial sources cite a total of 50,000 in Canada alone. Canadian government figures have shown over 60,000 draft-age American males living in the country. *S. F. Chronicle*, Mar. 27, 1970, at 7, col. 5. The World Council of Churches estimates 50,000 deserters and draft evaders in Canada. *N.Y. Times*, Dec. 8, 1970, at 13, Col. 4. Canadian aid groups give estimates between 20,000 and 50,000. Letter from Bob Seeley, Central Comm. from Conscientious Objectors, Philadelphia, Pa., to the Harvard International Law Journal, May 11, 1971. See also Comment, *Draft Resisters in Exile: Prospects and Risks of Return*, 7 Colum. J. Law and Soc. Prob. 1, n. 1 (1971), which estimated the number of exiles in Canada at 8,000-10,000.

concern has been evidenced in public forums,³ in numerous articles in newspapers and periodicals,⁴ and in activities at various levels of government.⁵ As the American combat presence in Indochina decreases, public concern about the phenomenon may be expected to provoke a more elaborate official response. It is the purpose of this Comment, therefore, to examine *first*, the methods by which deserters and draft evaders have gained entry into Canada (which harbors the largest number of fugitives), and Sweden (whose government has taken special steps to accommodate deserters); *second*, the means by which the United States might gain jurisdiction over deserters and evaders who have fled to these two countries; and *third*, the punishment which these fugitives face upon return, and the legal and policy considerations underlying an executive or congressional decision on amnesty.

The term "deserter" as used here applies to all American servicemen who have made unauthorized departures from their posts of duty and who have remained absent for over thirty days.⁶ The term "draft evader" as used here includes Americans who evade or refuse registration with the Selective Service System⁷ or service in the armed forces of the United States.

STATUS OF AMERICAN DRAFT EVADERS AND DESERTERS IN CANADA AND SWEDEN

American military deserters and draft evaders seeking refuge abroad have had to consider how their status affects (1) their ability to enter a foreign country and (2) their legal status vis-à-vis the United States while abroad. This second consideration breaks down into (a) whether the evader or deserter can be reached by formal extradition and (b) whether he is subject to deportation or other forms of removal to an area over which the United States exercises jurisdiction. These considerations will be discussed here as they apply to the recent experience of deserters and evaders attempting to settle in Canada and Sweden.

A. Immigration into Canada

Geographic proximity and cultural similarities have undoubtedly been as instrumental as any complex legal considerations in the movement of American draft deserters and evaders to Canada.⁸ There are no official Canadian or

³ See notes 159, 160, 161 & 286 *infra* and accompanying text.

⁴ See, e.g., Fleming, *America's Sad Young Exiles*, *Newsweek*, Feb. 15, 1971, at 28; Richard, *American Deserters in Stockholm*, *Interplay*, Sept. 1970, at 28; Lang, *A Reporter at Large*, *New Yorker*, May 23, 1970, at 42; Bless, *What Draft Resisters Face*, *S.F. Chronicle*, Mar. 27, 1970, at 7 col. 5; *N.Y. Times*, Feb. 5, 1970, at 8 col. 4; May 11, 1970, at 13, col. 1; Nov. 5, 1970, at 5, col. 3.

⁵ See notes 162-65 & 167 *infra* and accompanying text.
and administratively classified as a deserter. *Hearings Before the Subcomm. on the Treatment of Deserters from the Military of the Sen. Comm. on the Armed Services*, 90th Cong., 2nd Sess. 4 (1968). Compare this classification with the statutory definition, p. 107 *infra*. The Department of Defense maintains systematic records of the total number of deserters. As early as 1968, the Department reported that over 53,000 servicemen were classified as deserters over a twelve month period. *S. Rep. No. 93*, 91st Cong., 1st Sess. 24 (1969). This figure prompted a subcommittee of the Senate Armed Services Committee to conclude that "the total number of deserters and those who are unauthorized absentees is of such magnitude as to provide reason for serious and special concern by civilian and military officials of the Department of Defense." *Id.* at 32. The desertion problem has since intensified; during the first ten months of fiscal year 1971 the army alone reported 68,449 desertions, nearly double the army's 1969 figure. *N.Y. Times*, Aug. 15, 1971, § 4, at 4, col. 7. If the total number is indicative of the number of deserters abroad, there is reason to believe that the number abroad has been increasing in recent years. In the two countries most populated with deserters, Canada and Sweden, it is thought that there are about 1100 deserters. *N.Y. Times*, Feb. 5, 1970, at 8, col. 4. The Swedish government has stated that 500-525 deserters are residing in Sweden. See note 33 *infra* and accompanying text.

⁷ To evade or refuse registration with the Selective Service System would include making or causing to be made false, improper or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment or muster, or false statements under any provision of the act. This definition accords with the punishment provision of the act, 50 U.S.C. App. § 462(a) (1970). No official figures are publicly available on the number of draft evaders abroad. But see note 2 *supra*. The number is necessarily uncertain since most evaders have, for obvious reasons, been out of touch with official sources. Any estimate is, of course, complicated by the fact that many evaders have presumably left the country without registering for the draft.

⁸ Canada, whose foreign policy long mirrored that of the United States, has in recent years developed a distinct approach to foreign relations in some areas. This was a goal of a major reevaluation of foreign policy undertaken in 1967. See Secretary of State for External Affairs, *Foreign Policy for Canadians* 38 (1970); Department of External Affairs, *Perspectives in Foreign Policy*, Statements and Speeches 70/1 (1970). Canada has publicly condemned various aspects of the United States involvement in Indochina. See Department of External Affairs, *Some Elements of Canadian Foreign Policy*, Statements and Speeches 70/9 (1970).

American estimates as to the number of evaders and deserters who have emigrated to Canada,⁹ but the Canadian government does estimate that emigration from the United States to Canada has doubled in the last ten years to approximately 25,000 annually, with most of the emigrants falling in the 20-29 year-old age bracket.¹⁰ Nor is it known how many evaders or deserters (1) currently enjoy visitor status;¹¹ (2) reside in Canada illegally; or (3) have returned to the United States.

It is the announced policy of Canada not to discriminate against deserters or evaders seeking refuge in Canada.¹² But neither does the draft evader or deserter benefit from any special provisions to ease the legal requirements for residency in Canada. To remain permanently in Canada, aliens must obtain "landed immigrant" status under the Immigration Act.¹³ This status is currently available with certain qualifications to those who achieve a minimum of fifty "points" on a purportedly objective rating system. Major point categories are as follows:

- (a) 1 point for each year of formal education, vocational training or apprenticeship (maximum 20);
- (b) up to 15 points for skills or professions in high demand;
- (c) up to 10 points for any other useful skill;
- (d) 10 points if applicant is 18-35 years old;
- (e) 10 points if applicant is applying from without Canada and has a firm job offer within Canada;
- (f) 5 points each for fluency in English or French;
- (g) 5 points if applicant has relatives in Canada at the place he wishes to live willing to assist him, 3 points if he has relatives anywhere in Canada willing to assist him; and
- (h) up to 15 points on the basis of an interviewing officer's personal evaluation of the applicant.¹⁴

Additionally, there are provisions, rarely invoked, whereby the fifty point minimum can be waived or a person scoring more than fifty points can be denied entry, at the discretion of the interviewing officer.¹⁵

Under the above schedule an eighteen year-old American applying either at the border or at a Canadian consulate, who speaks only English and has no special skills, but has arranged for unskilled employment in Canada, begins with a maximum of 37 points.¹⁶ Thus, the personal assessment of the interviewing Immigration Officer can be crucial. The interviewing officer has considerable latitude, since there are no standards in either the Immigration Act or the applicable Statutory Orders and Regulations¹⁷ as to what questions the Immigration Officer may ask the applicant. However, the Canadian policy not to discriminate against evaders and deserters presumably bars direct questions as to an applicant's military status. A Canadian attorney active in immigration law confirms that deserters and evaders are currently not discriminated against as such, but applicants of their age group sometimes suffer in isolated cases where an immigration official might tend to discriminate in his personal assessments of young people evidencing "counter-culture" life styles, or, more

⁹ Letter of Consul Allen Bryce, of the Canadian Consulate-General in New York, to Harvard International Law Journal, Oct. 20, 1971; but see notes 2 and 6 *supra*.

¹⁰ Canadian Press and Information Service, Statement of Mar. 25, 1971, New York, New York.

¹¹ The Canadian Immigration Act, Can. Rev. Stat. c. 1-2 (1970), does not specifically limit the time an alien may stay in Canada as a visitor. Section 7(3) requires the alien to deport to immigration officials any change in status which would cause him to cease being a tourist or visitor, and section 7(4) allows the Immigration Minister to declare on his own initiative that the alien is no longer a tourist or visitor. Section 6 establishes a presumption that the alien is an applicant for immigrant status and not a tourist or visitor. Presumably, taking a job in Canada, coupled with extended residence there, would establish the deserter or evader as no longer being either a tourist or visitor.

¹² Statement of Canadian Minister of Manpower and Immigration MacEachen, *quoted in* N.Y. Times, May 23, 1969, at 5, col. 1.

¹³ Can. Rev. Stat. C. 1-2 (1970).

¹⁴ Immigration Regulations, Part I, *as amended*, Can. Stat. Orders and Regs. No. 67-434 (1967).

¹⁵ Can. Rev. Stat. C. 1-2 § 32(4) (1970).

¹⁶ Education, 12; 18-35 years old, 10; Knowledge of English, 5; job offer, 10: total of 37 points maximum.

¹⁷ Immigration Inquiries Regulations, Can. Stat. Orders and Regs. No. 67-621 (1937); Immigration Regulations, Part I, Can. Stat. Orders and Regs. Nos. 62-36 (1967), 64-327 (1964), 66-147 (1966), 67-434 (1967).

importantly, where young applicants are unable to accumulate enough points under the education and skill categories.¹⁸

On some occasions, border authorities have reportedly refused entry to visitors and landed immigrant applicants and have sent them back to the United States, while simultaneously notifying the American Federal Bureau of Investigation that the applicant was returning.¹⁹ Such activity is not now officially sanctioned respecting draft evaders and deserters,²⁰ though informal cooperation might be less accountable to official policy. A Canadian official has acknowledged that such cooperation is sometimes given regarding other fugitives from American laws.²¹ By contrast, the applicant who enters Canada as a visitor and while there applies for landed immigrant status has a right to appeal a denial of his application to the Immigration Appeals Board before he can be returned to the United States.²² (The Board has broad powers in reviewing the acts of lower officials, as discussed *infra* at p. 105).

There are several further obstacles to obtaining landed immigrant status which could affect the American draft evader or deserter. Section 5(1) of the Immigration Act²³ bars absolutely the entry of persons who have previously associated with any group which is reasonably believed to advocate or promote subversion of democratic government, unless the Immigration Minister is convinced that entry would not be detrimental to Canadian security. Further, section 5(m)²⁴ provides a similar bar to anyone who has himself advocated subversion, and section 5(n)²⁵ bars those who might engage in espionage or other subversive activities. On occasion these provisions have reportedly been used to exclude American student radicals from Canada,²⁶ but there are no reported cases in Canadian courts involving this section of the Act.

Canada also bars persons convicted of, or who have admitted committing, "crimes of moral turpitude."²⁷ This bar has been held to extend even to cases where the person is convicted after entry on an indictment returned before entry.²⁸ No case to date has sought to apply the bar to those who have only been accused of a crime. The Immigration Appeals Board in *Turpin v. Minister of Manpower and Immigration*²⁹ adopted the language of the Canadian court in *King v. Brooks*³⁰ in defining "moral turpitude" as follows:

It appears clear that the crime must necessarily involve some element of depravity, baseness, dishonesty or immorality. This would probably include most offenses classed as felonies in the United States of America.

It is arguable that confessed draft evasion or desertion would fall within this interpretation of moral turpitude were it not for the official government policy not to discriminate against evaders and deserters for entry and immigration purposes. There is nothing in that policy, however, to warrant the implication that evaders or deserters who have committed other felonies (such as narcotics violations) would not be barred, although no cases dealing with this question have arisen in the Canadian courts.

Finally, the Immigration Act bars those aliens who might become public charges.³¹ Such a provision works a special hardship on the young deserter or evader without income, a job offer, or relatives in Canada.

In summary, the evader or deserter who desires the benefits of Canadian landed immigrant status faces an apparently objective scoring system tempered by a subjective evaluation of his character. In practice, although he faces no formidable entry barrier, the greatest obstacles to legally remaining in Canada indefinitely result from his youth and lack of education and financial re-

¹⁸ Letter from Canadian Attorney Clayton C. Ruby to the Harvard International Law Journal, Feb. 23, 1971, at 5.

¹⁹ *Id.*

²⁰ Telephone interview with Consul-General Bruce Rankin, Canadian Consulate-General, New York, N.Y., Oct. 18, 1971.

²¹ *Id.*

²² Immigration Appeals Board Act, Can. Rev. Stat. c. I-3, § 11 (1970).

²³ Immigration Act, Can. Rev. Stat. c. I-2, § 5(1) (1970).

²⁴ *Id.* § 5(m).

²⁵ *Id.* § 5(n).

²⁶ Clayton Ruby letter, *supra* note 18, at 4.

²⁷ Immigration Act, Can. Rev. Stat. c. I-2, § 5(d) (1970).

²⁸ *Hecht v. McFaul and Attorney General of Province of Quebec*, 1961 Que. Sup. Ct. 392 (1961).

²⁹ 1 Immigration Appeals Cases 1, 15 (1961).

³⁰ 31 W.W.R. 673, 683 (1960).

³¹ Immigration Act, Can. Rev. Stat. c. I-2, § 5(h) (1970).

sources. The only alternative to obtaining landed immigrant status is illegally overstaying after entering Canada as a visitor. Those found to have overstayed are subject to criminal penalties and deportation,³² though there is no evidence of any concerted effort by the Canadian government to identify and return overstaying deserters or evaders.

B. Immigration Into Sweden

Fewer Americans have found their way to Sweden. Since Ray Jones III, the first American deserter from the Vietnam war to go to Sweden, entered that country in January, 1967, only 500-525 deserters have followed, mostly from bases in nearby Germany.³³ There is no government estimate of the number of draft evaders in Sweden, but distance from the United States has apparently kept the number small. Swedish Prime Minister Olaf Palme stated in a June, 1970, interview³⁴ that the total number of American refugees in Sweden is quite small compared with that of other refugee groups such as French Algerians and Czechs. Palme stressed that "the Swedish government does not encourage anyone to desert. Small groups in Sweden have been active in these affairs, but that has nothing to do with the government."^{34a} Even if not elevated to the status of national policy, however Swedish sympathy for American deserters has evidenced itself in the application of immigration laws to assist their immigration into Sweden.^{34b}

Immigration into Sweden is regulated by the Aliens Act of 1954³⁵ as self does not pose special problems for the deserter or evader. However, implemented by the Aliens Decree of May 23, 1969,³⁶ As in Canada, entry itself does not pose special problems for the deserter or evader. However, an evader or deserter wishing to reside and work in Sweden for more than three months must obtain both a residence permit³⁷ and a labor permit.³⁸

There is nothing in the procedure established for obtaining a residence permit which works any special hardship on the deserter or evader. Application can be made before or after entry as a visitor.³⁹ Permits are issued by the local police in the area in which the alien wishes to reside. The rules of the National Immigration Board⁴⁰ require a check to determine if the alien has a criminal record.⁴¹ It is not clear whether a criminal conviction necessarily bars issuance of a permit to an alien, though it is undoubtedly taken into consideration. A residence permit, once issued, is valid for three years and is renewable.⁴² Apparently, most American deserters and evaders would have little difficulty obtaining a residency permit.

The difficulty for the deserter or evader arises in connection with the issuance of a labor permit. The Alien Decree stipulates that:

An alien is not entitled, without possessing a labor permit (*arbetsstillstånd*) to hold employment in Sweden.⁴³

³² *Id.* § 46 provides maximum penalties of 6 months imprisonment and/or \$500 fine for a first offense; 12 months imprisonment and/or \$1000 fine for a second offense; and 18 months imprisonment for a third or subsequent offense.

³³ Telephone interview with Mr. M. Backman, Royal Swedish Embassy, Washington, D.C., Oct. 12, 1971 [hereinafter Backman Interview].

³⁴ U.S. News and World Report, June 22, 1970, at 48.

^{34a} *Id.*

^{34b} Unofficial Swedish and American groups in Sweden state that the deserter and evader are also entitled to a living allowance, free language school and job training from the Swedish government. Svenska Kommittén för Vietnam, Stockholm, *Information to Guide an American Deserter in Sweden*; American Deserters Committee, Stockholm, "A Fact Sheet for Deserters and Draft Resisters in Sweden." The latter documents are on file at the Harvard International Law Journal.

³⁵ Aliens Act of April 30, 1954 (No. 193). All provisions of the Act here cited were kindly translated by Mr. Jon Thormodsson, Harvard Law School, from *Forfattningssamling för Beskickningar och Konsulat* (FSBK) at 461 *et seq.* (1955).

³⁶ Aliens Decree of May 23, 1969 (No. 136). All provisions of the Decree here cited are as translated in the unofficial translation of Aug. 24, 1970, provided to the Harvard International Law Journal by the Royal Swedish Embassy, Washington, D.C.

³⁷ *Id.* § 32.

³⁸ *Id.* § 42.

³⁹ *Id.* § 33.

⁴⁰ *Id.* § 36.

⁴¹ Backman interview, *supra* note 33.

⁴² Aliens Decree of May 23, 1969 (No. 136) § 36. The American Deserters Committee in Stockholm asserts, however, that initially the labor and residence permits must be renewed "anywhere from every three to every twelve months," while after two years the deserter or evader can be granted resident alien status (*Bosättningsstillstånd*). American Deserters Committee, *supra* note 34b.

⁴³ *Id.* § 42.

Further:

An alien who has entered Sweden without being in possession of a labor permit must not be granted such permit as long as he is staying in Sweden.⁴⁴

The delay and advanced planning required by the above sections of the Decree, coupled with the possibility that the alien may lack any employable skills, could impose a severe hardship for the deserter or evader seeking sanctuary. In response to this problem the Swedish government, through the National Immigration Board, has taken action under Section 52 of the Aliens Decree⁴⁵ which allows the Board to grant a permit, notwithstanding other sections of the Aliens Act, to an alien already in Sweden

[i]f there are particularly strong reasons in view of the length of time the alien has been staying in Sweden, his personal circumstances and other facts of the case.

It is the apparent policy of the Swedish government to exercise this discretion to allow issuance of labor permits within Sweden to American deserters and evaders who can prove they were in danger of being sent to a war zone.⁴⁶ Those who can sustain this vague burden of proof are granted what the Swedish government terms "humanitarian asylum," the sole legal consequence of which is to exempt the fugitive from the requirement of obtaining a labor permit prior to entry. The term humanitarian asylum has no significance under Swedish law and is simply descriptive of the situation in which discretion under the Decree will be exercised.⁴⁷ The grant of humanitarian asylum is not to be construed as a grant of political asylum, which is authorized by a separate section of the Aliens Act.⁴⁸

C. Return by Extradition

The United States has established a comprehensive series of bilateral and multilateral treaties to effectuate the return of fugitives from its laws.⁴⁹ Treaties in effect with both Canada⁵⁰ and Sweden:⁵¹ the former is one of the oldest, amended seven times to broaden its scope over the years, while the latter, concluded in 1963, is one of the most recent.

⁴⁴ *Id.* § 46.

⁴⁵ *Id.* § 52.

⁴⁶ Backman interview, *supra* note 33. According to Swedish government officials, only American deserters can benefit from application of this discretion, but unofficial groups working within Sweden state that evaders also sometimes benefit. These unofficial sources cite a Swedish government communique of February 1969. Letter of Robert Argento, office of Advokat Hans Göran Franck, Stockholm, to the Harvard International Law Journal, Nov. 9, 1971; American Deserters Committee, wstockholm, "A Fact Sheet for Deserters and Resisters in Sweden" and "The Swedish Government and Political Asylum," on file at the Harvard International Law Journal. The standard of being sent to a war zone would seem to be susceptible to varying degrees of proof. In any case, the danger of being sent to a war zone would be more remote for the evader than the deserter.

⁴⁷ Telephone interview with Mr. Bu Hineback of the Royal Swedish Embassy, Washington, D.C., Nov. 10, 1971 [hereinafter Hineback interview].

⁴⁸ Political asylum is provided for in § 2(2) of the Alien Act:

A political refugee is taken in this Act to be an alien who is in his native country runs the risk of being subjected to political persecution. Political persecution means that a person, on account of his origin, his membership of a particular social group [sic], his religious or political opinion or otherwise on account of political conditions, is subjected to persecution that is directed against his life or freedom or is otherwise of a serious nature. . . .

For a suggestion that the standard is a strict one, see S. Sinha, Asylum and International Law 98 (1971); and that it might be meant to apply to refugees from totalitarian states, see Royal Ministry of Foreign Affairs, Documents on Swedish Foreign Policy 148-150 (1962).

⁴⁹ The United States is at present party to one multi-national extradition treaty and has bilateral extradition treaties with 81 countries. A complete list is contained in 18 U.S.C. § 3181 (1969). See generally I. Shearer, Extradition in International Law (1971).

⁵⁰ Extradition Convention Between the United States of America and Her Britannic Majesty supplementary to the treaty of August 1842 between the same High Contracting Parties, July 12, 1889, 26 Stat. 1508, T.S. No. 139 [hereinafter U.S.-U.K. Extradition Treaty]. The devinitive 1889 treaty is actually a supplement to a one-paragraph agreement to extradite included in a general boundary settlement between the United States and the United Kingdom of Canada. A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, Aug. 22, 1842, art. X, 8 Stat. 572, T.S. No. 119.

⁵¹ Convention on Extradition Between the United States of America and Sweden, Dec. 3, 1963, [1963] 2 U.S.T. 1845, T.I.A.S. No. 5496 [hereinafter U.S.-Sweden Extradition Treaty].

The United States is not necessarily limited to extradition by treaty, though that is usually the method employed. While federal extradition law⁵² prohibits the United States government from extraditing a fugitive from this country to a foreign country except for a crime enumerated in an extradition treaty,⁵³ it does not prohibit the United States from recovering a fugitive from a foreign state without benefit of treaty. The foreign state has full discretion whether to return the fugitive.⁵⁴ While the absence of recent American cases on the subject suggests that the practice is rare, United States courts have on occasion gained jurisdiction over a fugitive without recourse to an extradition treaty. In such cases a fugitive returned to the United States will not be granted *habeas corpus* and the courts will not deny jurisdiction to try him.⁵⁵ It is thus necessary to examine Canadian and Swedish extradition practice both under the specific treaties and municipal laws and in situations where the treaty does not cover the crime for which extradition is requested.

1. Extradition from Canada

Extradition from Canada is regulated by the Canadian Extradition Act,⁵⁶ which consists of two parts. Part One concerns extradition under an applicable treaty, while Part Two deals with extradition absent an applicable treaty.

Part One specifies that extradition by treaty is limited to the precise terms of the treaty.⁵⁷ Canadian courts have held that the Part serves neither to increase⁵⁸ nor decrease⁵⁹ the types of crimes for which a treaty may allow extradition. Part One by its own terms yields to any inconsistent treaty provision.⁶⁰

Article I of the Canadian-American extradition treaty⁶¹ lists the crimes to which the treaty is applicable. Neither draft evasion nor desertion have been included in either the treaty's original list of extraditable offenses or in any supplement.⁶² Extradition for evasion and desertion are thus not possible under the treaty as presently constituted. In addition, under the treaty the United States could not demand extradition of a fugitive for a listed crime and then try him for desertion or draft evasion, at least without permitting the evader or deserter reasonable time to leave the United States again.⁶³ The list of extraditable crimes has been amended before and could be amended again to include these two offenses.

Yet it is by no means clear that extradition would lie in such a case for those who had committed such offenses *before* the amendment of the treaty. Section 12 of the Extradition Act⁶⁴ provides that:

Every fugitive criminal . . . is liable to be apprehended, committed, and surrendered . . . in the manner provided in this Part whether the crime or conviction . . . was committed or took place before or after the date of the arrangement.

By this provision any amendments would be applied retrospectively. But by section 3 of the Extradition Act, this provision does not apply if it contravenes any section of the treaty, and the treaty arguably evinces an intention not to

⁵² 18 U.S.C. § 3184 (1968).

⁵³ This provision has been vigorously enforced. See *Factor v. Laubenhelmer*, 290 U.S. 276 (1933); *In re Wise*, 168 F. Supp. 366 (S.D. Tex. 1957); *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957), *cert. den.*, 355 U.S. 818 (1957); *Ramos v. Diaz*, 179 F. Supp. 459 (D. Fla. 1959).

⁵⁴ *Greene v. U.S.*, 154 F. 401 (5th Cir. 1907), *cert. den.*, 207 U.S. 596 (1907).

⁵⁵ *Ex parte Foss*, 102 Cal. 347, 36 P. 669 (1894).

⁵⁶ Extradition Act, Can. Rev. Stat. c. E-21 (1970).

⁵⁷ *Id.* § 3.

⁵⁸ *U.S.A. v. Novick*, 33 Can. Crim. 401 (Que. Sup. Ct. 1960).

⁵⁹ *U.S.A. v. Stegeman et al.*, 50 Can. Crim. 23 (B.C. Ct. App. 1966).

⁶⁰ Extradition Act, Can. Rev. Stat. c. E-21 § 3 (1970).

⁶¹ U.S.-U.K. Extradition Treaty, 26 Stat. 1508, T.S. No. 139.

⁶² Offenses listed in the 1889 treaty were manslaughter, counterfeiting, embezzlement, fraud, perjury, rape, burglary, piracy, mutiny, slave trading, and complicity in any of the above. Offenses added later were: fraud in obtaining money, destroying railroads, and procuring abortion, Dec. 13, 1900, 32 Stat. 1864, T.S. No. 391 (1901); bribery and bankruptcy law offenses, Apr. 12, 1905, 34 Stat. 2903, T.-. No. 458 (1907); grievous assault of a law officer, May 18, 1908, 35 Stat. 2035, T.S. No. 502 (1908); desertion of dependent children, May 15, 1922, 42 Stat. 224, T.S. No. 666 (1922); narcotics offenses, Jan. 8, 1925, 44 Stat. 2100, T.S. No. 719 (1925); and deceitfully obtaining money under false pretenses, Oct. 26, 1951, [1952] 2 U.S.T. 2826, T.I.A.S. No. 2454 206 U.N.T.S. 819.

⁶³ U.S.-U.K. Extradition Treaty, art. III, 26 Stat. 1508, T.S. No. 139.

⁶⁴ Extradition Act, Can. Rev. Stat. c. E-21 (1970).

extradite for any offenses not covered by treaty when committed. Article VIII⁶⁵ provides that:

The present convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced prior to the date which the convention shall come into force.

This provision would seem to apply to supplementary agreements as to extraditable offenses, since those agreements provide that they are integral to the treaty.⁶⁶ Hence each amendment to the list of extraditable crimes might, like the original list, be read to apply only prospectively. Since no case has raised the point to date, it is unclear whether article VIII would in fact bar retrospective application of an extradition treaty amended to include draft evasion or desertion.

Even if section 12 of the Immigration Act applies and the treaty were amended to include desertion and draft evasion as extraditable offenses, Canada may still refuse extradition of draft evaders under the treaty provision requiring "double criminality."⁶⁷ Double criminality requires that the offense, to be extraditable, must be a crime in both the demanding and the asylum states. Since Canada has no military conscription, there is no Canadian offense equivalent to draft evasion, and hence no double criminality as required. Canada does maintain volunteer armed forces, and thus desertion under American law would presumably have its Canadian equivalent.

Finally, the treaty bars extradition for political offenses, leaving it to the asylum state to determine exactly what qualifies as a political offense.⁶⁸ But neither desertion nor evasion has ever been so defined. At common law, a definition of political offense has developed which requires that the crime be committed in the course of an attempt to overthrow constituted governmental authority and for the purpose of seizing political control in the state.⁶⁹ This definition has been accepted by a Canadian court⁷⁰ and no contrary definitions have apparently arisen. Neither draft evasion or desertion due to opposition to the Vietnam war would seem to qualify as a political offense under this standard.

Part Two of the Extradition Act, as noted above,⁷¹ provides for extradition without recourse to treaty. Yet even under this Part, the American deserter or evader currently appears safe from extradition. Upon executive proclamation invoking Part Two:⁷²

Where no extradition arrangement exists between Her Majesty and a foreign state, or where an extradition arrangement, extending to Canada, exists between Her Majesty and a foreign state, but does not include the crimes mentioned in Schedule III, it is nevertheless lawful for the Minister of Justice to issue his warrant for the surrender to such foreign state of any fugitive offender from that foreign state charged with or convicted of any of the crimes mentioned in Schedule III.⁷³

Schedule III lists 22 crimes⁷⁴ but does not include either desertion or draft evasion. But, unlike Part One, which applies extradition treaties prospectively

⁶⁵ U.S.-U.K. Extradition Treaty art. VIII, 26 Stat. 1508, T.S. No. 139.

⁶⁶ See, e.g., art. II, 34 Stat. 2903, T.S. No. 458.

⁶⁷ Art. I of the 1889 treaty implicitly requires that the offense, to be extraditable, must be a crime in both the United States and Canada, and has been so interpreted in Canadian courts. Ex parte Thomas, [1917], 38 D.L.R. 716 (1917); *Washington v. Fletcher* [1926] 3 D.L.R. 426 (1926); *In re Clark* [1929] 3 D.L.R. 737 (1929). All elements of the crime need not be exactly the same. *Id.*

⁶⁸ U.S.-U.K. Extradition Treaty, art. II, 26 Stat. 1508, T.S. No. 139, provides that:

A fugitive criminal shall not be surrendered if the offense . . . be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try and punish him for an offense of a political character.

* * * * *

If any question shall arise as to whether a case comes within the provision of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

⁶⁹ *In re Castioni*, 2 Q.B.D. 149 (1891).

⁷⁰ *In re Fedorenko*, 15 W.L.M.R. 369 (1910).

⁷¹ See p. 97 *supra*.

⁷² Extradition Act, Can. Rev. Stat. c. E-21 § 35(1) (1970).

⁷³ *Id.* § 37(1).

⁷⁴ *Id.* Schedule III includes the following offenses: murder, manslaughter, counterfeiting, forgery, larceny, embezzlement, fraud in obtaining money or goods, rape, abduction, child stealing, kidnapping, burglary, arson, robbery, fraud by a corporate official, railway crimes, piracy, criminal scuttling of a vessel, assault on board a vessel, revolt on board a vessel, abortion and vicarious liability for any of the above.

and retrospectively unless the treaty by its terms provides otherwise,⁷⁵ section 36 of Part Two applies "to any crime, mentioned in Schedule III, that is committed after the coming into force of this Part. . . ."

Since there has been no proclamation to date involving Part Two for the benefit of the United States, much less a proclamation revising Schedule III, those deserters and evaders already in Canada would appear safe from extradition under this Part.

In sum, extradition either with or without a treaty does not appear currently available to the United States government to return draft evaders and deserters from Canada.

2. Extradition from Sweden

Extradition from Sweden is regulated by the Swedish Extradition Act of 1957.⁷⁶ It is the policy of Sweden not to extradite except in accordance with a treaty,⁷⁷ but it is not clear whether extradition without treaty is specifically prohibited. However, during the twelve year period from 1951 to 1963, when no extradition treaty existed between the United States and Sweden, extradition did not occur.⁷⁸

The Swedish-American treaty⁷⁹ like the Canadian-American treaty provides for extradition only for listed crimes. Article II of the agreement, however, includes in this list neither draft evasion nor desertion.⁸⁰ Since article I bars extradition for one offense and trial for another, under the present treaty the draft evasion or desertion. There is a further bar regarding desertion. Unlike the Canadian-American treaty, the Swedish-American treaty contains a provision whereby "[e]xtradition shall not be granted . . . when the offense is purely military."⁸¹ While there are no American or Swedish cases interpreting "purely military" offenses under this treaty, the provision appears frequently in extradition treaties and is generally interpreted as applying to violations of the internal rules of a military force, as opposed to common crimes committed against civilians in the course of military operations.⁸² Desertion, having no significance outside military organizations, would seem to qualify under the treaty as such a purely military, and thus non-extraditable, offense.

Even if the list of extraditable crimes in article II were amended by mutual consent of the contracting parties, it is not clear that Sweden would be obligated to extradite all evaders. Article V, section 5 of the treaty bars extradition.

[i]f the offense is regarded by the requested state as a political offense or as an offense connected with a political offense.

While it was noted above that common law jurisdictions, including Canada, have developed a definition of political offense which would probably not include desertion or evasion, it does not follow that Sweden would adopt this standard. Generally civil law systems, notably in Europe, have developed an alternate definition of political offense which is more generous to the alien. By this standard a political offense is one committed with predominantly political motives, objectives and circumstances.⁸³ There appear to be no Swedish decisions on the point and it cannot be asserted with any certainty that Sweden would choose so to define desertion and/or evasion. It should simply be noted that the broad definition would be open to Sweden and that, since the treaty leaves it to the asylum state to determine if the offense is political in nature,⁸⁴ the United States would have to accept such a decision, notwithstanding the use of the contrary definition by the United States.

⁷⁵ See p. 98 *supra*.

⁷⁶ Extradition Act of Dec. 7, 1957 (No. 147).

⁷⁷ Hineback interview, *supra* note 47.

⁷⁸ Message from the President Transmitting Convention on Extradition with Sweden, Sen. Exec. E, 87th Cong., 2d Sess. 2 (1963).

⁷⁹ U.S.-Sweden Extradition Treaty, [1963] 2 U.S.T. 1845, T.I.A.S. No. 5496.

⁸⁰ *Id.* Included offenses are: murder, manslaughter, malicious wounding kidnapping, rape, abortion, procuration, bigamy, robbery, burglary, arson, damaging railways and other modes of travel, piracy, blackmail, forgery, counterfeiting, embezzlement by a public official, use of mails to defraud, fraud by a fiduciary, bribery, perjury, slavetrading, bankruptcy law offenses, smuggling, narcotics violations, illicit manufacture of poisonous chemicals, attempt to commit the above, and complicity in any of the above.

⁸¹ U.S.-Sweden Extradition Treaty, art. V, [1963], 2 U.S.T. 1845, T.I.A.S. No. 5496.

⁸² See generally S. Bedi, Extradition in International Law and Practice, 196, 197 (1960).

⁸³ See, e.g., Re Camporini, [1924] 50 S.B.G.I. 229 (Fed. Trib. 1924); Re Kavic, [1952] 78 J. Trib. I. 39 (Fed. Trib. 1952) (Switzerland); Re Fabljan, Sup. Ct. Judgment of March 9, 1933, 67 RGSt. 150 (Germany). See generally, S. Sinha, *supra* note 48, at 170-202.

⁸⁴ U.S.-Sweden Extradition Treaty, art. V(5), [1963] 2 U.S.T. 1845, T.I.A.S. No. 5496.

In sum, only a revision of the Swedish-American extradition treaty would permit its use in returning deserters or draft evaders. Moreover, Sweden might consider evasion in the particular circumstances a political offense and deny extradition.

D. Alternatives to Return by Extradition

There remain at least two other methods by which the United States might attempt to obtain the return of its nationals to an area over which it exercises jurisdiction. First, the United States can invoke the NATO Status of Forces agreement to effect the return of certain military deserters from Canada.⁸⁵ Second, the United States might gain jurisdiction over deserters and evaders through "disguised extradition" in the form of deportation and its variants.

1. The NATO status of forces agreement

Sweden, as a neutral state, is not a signatory to any status of forces agreements with the United States; but under the NATO Status of Forces agreement, the United States can obtain the return from Canada of deserters from American posts in Canada. Article VII of the NATO agreement provides in part that:

1(a): [T]he military forces of the sending states shall have the right to exercise within the receiving state all criminal and disciplinary jurisdiction conferred on them by the law of the sending state over all persons subject to the military law of the state.

* * * * *

5(a): The authorities of the receiving states shall assist each other in the arrest of members of a force or civilian component and their dependents in the territory of the receiving state and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.⁸⁶

A strict reading of section 5(a) would imply an *obligation* on the part of the receiving state to aid in the arrest and return of a military deserter. Such is not the case. During negotiations for the treaty:

It was agreed by the Working Group at the suggestion of the Danish representative that the receiving state, upon notification of desertion by the sending state, had the right to search for and arrest any deserter with a view toward handing him over to the sending state. It was not the intention to lay any obligation on the receiving state to take such action but merely to provide that it was entitled to carry it out. It therefore appears from the preparatory works that the receiving state is free to act as it wishes when he [sic] receives appropriate information from the sending state. In fact, states cooperate very actively for [sic] the search for deserters.⁸⁷

Further, the provisions of the NATO agreement have been interpreted as not to be applicable to American deserters from posts outside of Canada who take refuge in Canada. The treaty provisions refer only to return of offenders from the receiving to the sending state. No mention is made of third states which might also be party to the agreement. Article I of the agreement defines a military force to include "the personnel belonging to the land, sea and air armed forces of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area *in connection with their official duties* . . ." [emphasis added], and describes a receiving state as the territory of which the force or civilian component is either stationed or in transit.⁸⁸ From this, the authorization to search for and return members of visiting military forces can be read to extend only to those members of the force actually *stationed* in the state. Thus, Canada has returned American personnel from bases in Canada (whether to the United States or to American bases in Canada is uncertain) but has not returned servicemen in Canada who deserted from bases outside Canada.⁸⁹ It appears that the vast majority of American military deserters in Canada are thus not subject to return to American authorities under the Status of Forces agreement.⁹⁰

⁸⁵ The Agreements also apply to civilians stationed abroad as part of the military force. See note 86 *infra* and accompanying text.

⁸⁶ Agreement Between Parties to the North Atlantic Treaty Regarding the Status of their Forces, August 23, 1953, [1953] a U.S.T. 1972, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

⁸⁷ S. Lazareff, Status of Military Forces Under Current International Law 118 (1971).

⁸⁸ "In transit" presumably does not refer to an individual traveling in Canada in order to desert.

⁸⁹ Rankin interview, *supra* note 20.

⁹⁰ This analysis would apply to other NATO member states as well.

2. Deportation and its variations

In theory, deportation is the unilateral act of a state for the protection of its own citizens and interests. In fact, deportation is sometimes used to accommodate other states which cannot or do not wish to resort to formal extradition to bring about the return of a fugitive.⁹¹ This practice holds the gravest hazards for the deserter or evader abroad. The United States has occasionally resorted to deportation in lieu of formal extradition, in the absence of an extradition treaty⁹² and in open disregard for an existing treaty.⁹³ This informal extradition has been practiced in cooperation with Canada at times,⁹⁴ but not in any recent cases involving deserters or evaders.

Only when the formal deportation procedures of a state are used does the deserter or evader have a useful opportunity to challenge the deportation. The procedures followed by the asylum state thus become crucial. Deportation of evaders or deserters from Canada or Sweden to the United States is unlikely for several reasons. First, deportation requires the cooperation of the asylum state. Second, under both the Canadian and Swedish statutes, deportation is not generally committed to executive discretion.⁹⁵ A deportation order in these countries will issue only for cause. Finally, both states have established procedural safeguards to protect the alien from abuse of the deportation process.

Under the Canadian Immigration Act⁹⁶ there are three general categories of deportable aliens. First, those who enter Canada illegally, or use fraud in their application, are subject to deportation.⁹⁷ The second category consists of those who, once in Canada, are convicted of offenses under the Canadian Criminal Code⁹⁸ or of certain crimes against Canada such as subversion, espionage, or disloyalty.⁹⁹ Section 18(d) of the Act renders deportable aliens who are convicted of violations of the Narcotics Control Act.¹⁰⁰ Third, section 18(e)(v) makes an alien subject to deportation who

[h]as, since his admission to Canada become a person who, *if he were applying for admission to Canada would be refused admission* by reason of his being a member of a prohibited class. . . . [emphasis added]

This section makes subject to deportation an alien who did not fall into any prohibited class at entry and has not committed any violations of Canadian law. It gives the Canadian government the power to deport groups of aliens who have not breached any laws, but who are classed as undesirables, since section 57(g) of the Act permits the executive to make rules as to prohibited classes on the basis of:

- (i) nationality, citizenship, ethnic group, occupation, class or geographical area of origin,
- (ii) peculiar customs, habits, modes of life or methods of holding property,
- (iii) unsuitability, having regard to the climate, economic, social, industrial, labor, health or other conditions. . . .

When a deportation order has issued, the Immigration Appeals Board Act¹⁰¹ provides that:

[a] person against whom an order of deportation has been made under the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact.

The Board has exclusive jurisdiction¹⁰² but the decisions of the Board can be reviewed as to matters of law by the Canadian Supreme Court, if that Court grants leave to appeal.¹⁰³

The Immigration Appeals Board has wide discretion to set aside deportation orders. The Board may, having regard to all the circumstances of the case, in-

⁹¹ See generally O'Higgins, *Disguised Extradition: The Soblen Case*, 27 Mod. L. Rev. 521 (1964).

⁹² E.g., Egyptian officials placed a fugitive on board a ship bound for the United States, 2 J. Moore, *International Law Digest* 633 (1906).

⁹³ E.g., United States officials entered Mexico and took custody from Mexican authorities without any extradition proceedings. *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), 244 F. 2d 520 (2d Cir. 1956), cert. den., 355 U.S. 873 (1956).

⁹⁴ Evans, *Acquisition of Custody Over International Fugitive Offenders, Alternatives to Extradition: A Survey of U.S. Practice*, 40 Brit. Y.B. Int'l L. 77 (1964).

⁹⁵ Section 34 of the Swedish Aliens Act of April 30, 1954 (No. 193) apparently empowers the King-in-Council (Executive) to extradite without reference to other sections of the Act in extraordinary circumstances involving a threat to the national security.

⁹⁶ Immigration Act, Can. Rev. Stat. c. I-2 (1970).

⁹⁷ *Id.* § 18(e) (vi-x).

⁹⁸ *Id.* § 18(e) (ii).

⁹⁹ *Id.* § 18(s) (a-c).

¹⁰⁰ Narcotics Control Act, Can. Rev. Stat. c. N-1 (1970).

¹⁰¹ Immigration Appeals Board Act, Can. Rev. Stat. c. I-3, § 11 (1970).

¹⁰² *Id.* § 22.

¹⁰³ *Id.* § 23.

cluding the "existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,"¹⁰⁴ stay or quash a deportation order and allow the alien to remain in Canada subject to such conditions as it sees fit.¹⁰⁵

Even if the American deserter or evader were ordered deported, he would not necessarily be returned to the United States. The Immigration Appeals Board Act gives the Immigration Minister discretion to deport the alien to his home country or to another country,¹⁰⁶ while section 33(2) of the Act provides that

[u]nless otherwise directed by the Minister or Immigration Officer in charge, a person against whom a deportation order has been made may be requested or allowed to leave Canada voluntarily.

This provision would give the deserter or evader the opportunity to leave Canada for some other sanctuary, assuming another country would allow him to enter.

The deportation policy of Sweden is comparable to that of Canada. The Aliens Act¹⁰⁷ provides for deportation for those who (a) cannot support themselves, (b) become dangerous alcoholics, (c) fail to meet their social obligations or (d) are convicted of crimes outside of Sweden and might be expected to repeat those crimes in Sweden.¹⁰⁸ Those who give false information in applying for entry are likewise deportable.¹⁰⁹ Further, a court which has convicted an alien of an offense punishable by imprisonment can also order his deportation.¹¹⁰

In addition to the courts, local county administrations as well as the National Immigration Office and the King-in-Council (the national executive) can instigate deportation proceedings.¹¹¹ Deportation orders by lower bodies must be approved by the National Immigration Office, which functions with the advice of an independent Aliens Board,¹¹² and which, along with the King-in-Council, has discretion to void deportation orders.¹¹³ Section 44 of the Act provides for appeal to the National Immigration Office, and section 46 allows appeals to the King-in-Council. At all stages of the proceedings the alien is entitled to a hearing, notice of the results, a summary of reasons, and information as to how to prosecute an appeal.¹¹⁴ The Aliens Decree¹¹⁵ provides for counsel for the alien at state expense in some cases.¹¹⁶

As in Canada, the alien in Sweden may leave voluntarily¹¹⁷ and only where it appears that the alien will not voluntarily obey the deportation order will coercive deportation occur.¹¹⁸ Sweden has forcibly returned to American jurisdiction deserters convicted of a criminal offense while in Sweden.¹¹⁹

F. Conclusion

This Comment has thus far examined the major legal obstacles which the American deserter or draft evader faces in attempting to take refuge in Canada or Sweden, and the obstacles the United States would face if it attempted to gain jurisdiction over him. Neither the Swedish nor the Canadian extradition treaties with the United States requires extradition of deserters or draft evaders. Thus, with the limited exception of certain deserters in Canada who may be reached through the NATO Status of Forces Agreement, the status of the deserter or draft evader who wishes to take refuge in Canada or Sweden turns on the discretion of the asylum state. This discretion has operated largely in favor of both deserters and evaders in Canada, whose immigration policy operates without discrimination against the deserter and evader, and in

¹⁰⁴ *Id.* § 15(1) (b) (ii).

¹⁰⁵ *Id.* § 15(2).

¹⁰⁶ Immigration Act, Can. Rev. Stat. c. I-2, § 33(1).

¹⁰⁷ Aliens Act of April 30, 1954 (No. 193). See note 35 *supra*.

¹⁰⁸ *Id.* § 29(1-4).

¹⁰⁹ *Id.* § 50.

¹¹⁰ *Id.* § 26.

¹¹¹ *Id.* §§ 30, 31(2).

¹¹² *Id.* § 3.

¹¹³ *Id.* § 30.

¹¹⁴ *Id.* §§ 31, 33.

¹¹⁵ Aliens Decree of May 23, 1969 (No. 136). See note 35 *supra*.

¹¹⁶ *Id.* § 86.

¹¹⁷ *Id.* § 68.

¹¹⁸ *Id.* § 73.

¹¹⁹ Joseph Parra, a deserter from an American base in Germany, was deported to the United States after conviction and imprisonment in Sweden for narcotics violations. See Lindin, *Yale Deserter*, *Yale Alumni Magazine*, February 1971 at 12.

favor of certain deserters and evaders in Sweden, where immigration barriers more difficult than those of Canada have been specially eased. Consistent with their immigration policies, Canada and Sweden do not deport deserters or draft evaders to the United States or elsewhere merely because they are deserters or evaders.

The current benevolence of these two countries, however, cannot alter the uncertainty inherent in dependence on another nation's discretion. Admitting and harboring another nation's military deserters and draft evaders involves both the domestic and foreign policies of the asylum state. The Swedish and Canadian immigration policies toward American deserters and evaders conflict with the United States' interests in punishing violators of its laws and in raising and maintaining armed forces. The asylum states might decide at some future date that this affront to American interests is no longer in their best foreign policy interests. Independent of this foreign policy consideration, deserters and draft evaders might be unwelcome in the future, should harboring them become no longer consistent with the asylum state's domestic interests. For either domestic or foreign policy reasons, Canada or Sweden, or both, might deem it in their respective interests to tighten their immigration and deportation policies. Procedural safeguards in both Canada and Sweden afford protection against deportation for deserters and evaders residing legally in those countries, but illegal residents could be more easily expelled, and further immigration could be curtailed.

It appears highly unlikely that Canada, Sweden, or any other nation would bind itself to an international agreement rendering more secure the status of deserters and evaders seeking refuge abroad. Nations are unlikely to limit the flexibility of their foreign and domestic policies by restricting themselves to international standards for the benefit of deserters and draft evaders. [D.W.J.]

PUNISHMENT UPON RETURN

Deserters and draft evaders who return to the United States face a variety of statutory and administrative sanctions, the application of which is often contingent upon official discretion or upon the circumstances of each case. Sanctions applicable to deserters are imposed by military administrators or courts-martial, whereas sanctions against draft evaders are imposed by civilian courts and administrative agencies applying immigration and selective service laws.

A. Sanctions Against Deserters

The Uniform Code of Military Justice (U.C.M.J.) defines a deserter as "any member of the armed forces who . . . [w]ithout authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently."¹²⁰ Although the U.C.M.J. gives the courts-martial broad discretion in selecting a penalty for this offense,¹²¹ the guidelines established by the President in the Manual for Courts-Martial, which are binding on the courts-martial,¹²² include a maximum penalty of five years confinement at hard labor plus a dishonorable discharge.¹²³ The penalty for an absence without leave (A.W.O.L.) of more than thirty days, which differs from desertion since there is no intent to remain away permanently, is one year's confinement at hard labor plus a dishonorable discharge.¹²⁴

No official data is available to the public concerning the average sentences served by those found guilty of desertion or long-term A.W.O.L.¹²⁵ However, there is evidence that treatment of deserters by courts-martial is varied and inconsistent,¹²⁶ and that very few actual deserters are ever convicted of the offense of desertion.¹²⁷ The Subcommittee on the Treatment of Deserters of the

¹²⁰ 10 U.S.C. § 885(a)(1) (1970).

¹²¹ 10 U.S.C. § 885(c) (1970).

¹²² "The limitations imposed by the President are in effect until such time as he suspends or modifies them, or upon a declaration of war." Manual for Courts-Martial, ch. 25, § 125 (rev. ed. 1969).

¹²³ *Id.* Table of Maximum Punishments, 25-11, § 127C.

¹²⁴ *Id.*

¹²⁵ Letter from K. A. Konopisos, Captain, J.A.G.C., U.S. Navy, Mar. 25, 1971; Letter from Robert E. Miller, Colonel, J.A.G.C., Chief, Military Justice Division, Department of the Army, April 16, 1971. These letters are on file at the Harvard International Law Journal.

¹²⁶ See, e.g., N.Y. Times, May 1, 1969, at 6, col. 1.

¹²⁷ S. Rep. No. 93, 91st Cong., 1st Sess. 26 (1969).

Senate Armed Services Committee found that during fiscal 1968 less than 0.5% of those men dropped from their unit rolls as deserters were eventually convicted of the offense of desertion.¹²⁸

There are many reasons for this extremely low rate of desertion convictions. First, it is difficult for the prosecutor to prove the element of intent to remain away permanently which is essential to a desertion conviction. Although the Manual for Courts-Martial provides that prolonged absence will give rise to a presumption of intent to remain away permanently,¹²⁹ the landmark case of *United States v. Cothorn*¹³⁰ held that the duration alone of the absence is not enough from which to infer intent to remain away permanently.¹³¹ As a result, a prosecutor must now bring in witnesses to prove the necessary intent, which requires additional time and expense to the military. Most prosecutors, therefore, usually seek convictions for A.W.O.L., which is easy to prove and requires no witnesses.¹³² Another common practice is to grant "undesirable" discharges administratively to those deserters who have been absent for over one year.¹³³ This procedure avoids not only the trouble and expense of a long trial, but also the necessity of finding a deserter and returning him to the correct military jurisdiction for court-martial. Although the Subcommittee on the Treatment of Deserters denounced both the granting of undesirable discharges in absentia and the trying of deserters for a lesser offense,¹³⁴ it appears that these practices still continue.¹³⁵

B. Sanctions Against Draft Evaders

Some of the draft evaders presently living abroad have violated no United States laws. Among these exiles are those who, prior to violating any provision of the Selective Service Act,¹³⁶ renounced their American citizenship abroad in the presence of an appropriate American consular official.¹³⁷ Such expatriates, now formally aliens, face a special problem created by United States immigration laws. Under this legislation, these expatriates become excludable aliens who may be deported upon return to the United States, since they will have "departed from or . . . remained outside the United States to avoid or evade" the draft during time of national emergency.¹³⁸ There are defenses available to these persons if they try to return to this country and deportation proceedings are brought against them.¹³⁹ For example, they may claim that their renuncia-

¹²⁸ *Id.* This represented a total of approximately 37 army and 20 navy personnel convicted of desertion in fiscal 1968, based on total numbers of persons dropped from the rolls during this period. See *Hearings Before the Subcomm. on the Treatment of Deserters from the Military of the Sen. Comm. on the Armed Services*, 90th Cong., 2nd Sess., 24 (1968).

¹²⁹ Manual for Courts-Martial at 28-11 (§ 164a) (rev. ed. 1969).

¹³⁰ 23 C.M.R. 383 (1957).

¹³¹ Formerly, the necessary intent was presumed from an absence of 9 months to one year or more. Anonymous interview with Captain, U.S. Army, Fort Devens, Mass., April 12, 1971 [hereinafter cited as Interview].

¹³² The length of unauthorized absences can be easily found in records kept at military bases. *Id.*

¹³³ This practice has been authorized by Department of Defense Directive 1332.14, para. VII(j) (1965). See also S. Rep. No. 93, 91st Cong., 1st Sess. at 25ff. (1969); Lynch, *The Administrative Discharge: Changes Needed?*, 22 Me. L. Rev. 141 (1970).

¹³⁴ S. Rep. No. 93, 91st Cong., 1st Sess. at 26, 31, 32 (1969).

¹³⁵ Interview, note 131 *supra*.

¹³⁶ 50 U.S.C. App. §§ 451-473 (1970).

¹³⁷ 8 U.S.C. § 1481(a)(6) (i) (1970). A similar provision, 8 U.S.C. § 1481(a)(10) (1970), which provides that American citizenship is automatically forfeited by leaving or remaining away from this country during time of war or national emergency in order to avoid military service, has recently been held unconstitutional by the Supreme Court on the ground that the automatic forfeiture results in a denial of due process. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

¹³⁸ 8 U.S.C. § 1182(a)(22) (1970). The national emergency declared by President Truman, Proc. No. 2914, 3 C.F.R. 99 (1949-1953 Comp.), 64 Stat. A 454, remains in effect today. See *Nielsen v. Secretary of the Treasury*, 424 F.2d 834, 839 (D.C. Cir. 1970). Succeeding presidents have acknowledged the continuing existence of this national emergency. See, e.g., Exec. Order No. 10905, 3 C.F.R. 436 (1959-1963 Comp.) (President Eisenhower); Exec. Order No. 11387, 3 C.F.R. 448 (1971) (President Johnson).

¹³⁹ For a general discussion of the range of administrative and penal sanctions which evaders may face, and the scope of the defenses available to them for avoiding such sanctions, see generally Comment, *supra* note 2, at 8-21. See also *Jolly v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971), cert. den., — U.S.—, 40 U.S.L.W. 3220 (Nov. 8, 1971); N.Y. Times, Apr. 14, 1971, at 6, col. 1; Nov. 15, 1971, at 1, col. 6.

tion of citizenship was involuntary,¹⁴⁰ or they may challenge the allegation that they left or remained away from the country in order to evade the draft.¹⁴¹ However, most defenses are as yet largely untested.¹⁴²

The majority of draft evaders outside the country have violated some provision of the Selective Service Act of 1967,¹⁴³ which was in effect when nearly all of these exiles left the country. The maximum penalty which this group faces upon return is five year's imprisonment or a \$10,000 fine, or both.¹⁴⁴ The courts have declared this penalty not to be cruel, excessive, or unusual, and they have not hesitated to apply it.¹⁴⁵

Local draft boards do not generally turn the name of a violator over to the appropriate U.S. Attorney until the draftee has refused induction orders three or four times.¹⁴⁶ The U.S. Attorney must then decide whether or not to seek an indictment.¹⁴⁷ Very often he will promise not to prosecute if the violator will submit to induction.¹⁴⁸ However, the U.S. Attorney has broad discretion in this matter, and once he decides to prosecute, the risk of conviction is extremely high. During fiscal 1970, less than 20% of those who were charged with draft-related offenses and whose cases were not dismissed were acquitted.¹⁴⁹

The average sentence for Selective Service offenses in fiscal 1970 was 33.5 months,¹⁵⁰ down slightly from the two previous years.¹⁵¹ This is higher than the average sentences for draft offenses in 1945 and in 1952, and it is more than 50% higher than the average sentence in 1965.¹⁵² However, more than 50% of those convicted during fiscal 1970 received probation only,¹⁵³ up from

¹⁴⁰ A recent federal court decision suggests that this defense is extremely limited. In *Jolly v. Immigration & Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971), cert. den.,—U.S.— (1971), 40 U.S.L.W. 3220 (Nov. 9, 1971), petitioner Jolly formally renounced his citizenship before the United States Consul in Toronto in May of 1967. Prior to March of 1968, Jolly returned to the United States. Deportation proceedings were brought against him pursuant 8 U.S.C.A. § 1251(a)(1) as an excludable alien, alleging that he had entered this country without a valid visa, 8 U.S.C.A. § 1182(a)(20), and had left and remained away during a period of national emergency to avoid the draft under 8 U.S.C.A. § 1182(a)(22). He was ordered to depart by a Special Inquiry Officer, whose decision was affirmed by the Board of Immigration Appeals. Jolly appealed for review under 8 U.S.C.A. § 1105(a), arguing *inter alia* that (1) his renunciation was not "voluntary," as required by cases interpreting § 1481(a)(6), because it was made under duress due to his opposition to the war; and (2) that even if he was an alien, he had entered the United States lawfully as an alien married to a citizen and "otherwise admissible at the time of entry" under 8 U.S.C.A. § 1251(f).

The Fifth Circuit Court of Appeals found that Jolly's renunciation was voluntary, that he was not "otherwise admissible," since he had remained outside the United States to avoid service in the armed forces during a period declared by the President to be a national emergency, 8 U.S.C.A. § 1182(a)(22). That is, the court held that Jolly was in fact an alien by virtue of his own renunciation, and that he was excludable, notwithstanding § 1251(f), since he had remained in Canada to avoid the draft. It is reported that Jolly will "not ask the Supreme Court to reconsider its refusal to hear his case." N.Y. Times, Nov. 23, 1971, at 5, col. 3.

¹⁴¹ This presumption of intent to avoid the draft is not easily rebutted. See Comment, *supra* note 2 at 8-9.

¹⁴² See *id.* at 8-21.

¹⁴³ 50 U.S.C. App. §§ 451-73 (1970).

¹⁴⁴ 50 U.S.C. App. § 462(a) (1970). By contrast, the maximum penalty for violation of the nation's first Selective Service Act was only one year imprisonment. Selective Service Act of 1917, ch. 15, §§ 5, 6, 40 Stat. 76.

¹⁴⁵ *Cooper v. United States*, 403 F.2d 71 (10th Cir. 1968) (5-year sentence); *Quaid v. United States*, 386 F.2d 25 (10th Cir. 1967) (5-year sentence, conviction reversed on other grounds); *Kramer v. United States*, 147 F.2d 756 (6th Cir. 1945) (5-year sentence).

¹⁴⁶ Survey conducted by the Selective Service System, N.Y. Times, Apr. 16, 1971, at 15, col. 1.

¹⁴⁷ 32 C.F.R. § 1642.42 (1970); see generally Comment, *supra* note 2, at 2-3.

¹⁴⁸ Letter from Robert C. Mardian, Assistant Attorney General, Internal Security Division, U.S. Department of Justice, Sept. 23, 1971, on file at the Harvard International Law Journal. See N.Y. Times, Apr. 16, 1971, at 15, col. 1. During fiscal year 1970, 56% of the 2833 defendants charged with draft-related offenses had their cases dismissed. Administrative Office of the United States Courts, *Federal Offenders in the District Courts*, Table D-4 (1970) [hereinafter cited as *Federal Offenders*]. This was presumably subject to the draft anew. For a discussion of the defenses available to draft evaders, 32 C.F.R. § 1643.1-3 (1971), providing that convicted draft violators may be paroled in return for submission into the armed services or to some form of alternative service.

¹⁴⁹ *Federal Offenders*, Table D-5. And, of course, most of those acquitted are presumably subject to the draft anew. For a discussion of the defenses available to draft evaders, see Comment, *supra* note 2, at 21-24.

¹⁵⁰ *Federal Offenders*, Table D-5.

¹⁵¹ *Id.* Table H-10 at 190.

¹⁵² *Id.*

¹⁵³ *Id.* Table D-5.

39% in 1969 and 10% in 1967.¹⁵⁴ In addition, parole is granted more frequently to persons serving terms for draft offenses than to other federal offenders, and draft offenders are generally paroled after serving about half their term.¹⁵⁵

C. Conclusion

Most deserters face certain conviction upon return for the offense of absence without leave for more than thirty days. These men will probably receive penalties of up to one year's confinement at hard labor plus a dishonorable discharge and its attendant social disadvantages. Apparently, very few of the deserters who remain abroad will ever be tried and convicted of the offense of desertion. Many deserters living abroad have already been given undesirable discharges by which the armed services have forfeited jurisdiction over them. The results of these discharges, of course, include loss of veterans' benefits and perhaps some difficulty in securing employment in the United States. However, no member of this class of offenders will lose his citizenship.¹⁵⁶

With respect to draft evaders, past statistics would indicate that roughly 50% of the delinquent draft evaders who decide to return to the United States will be inducted into the armed services, approximately 25% will spend an average of 20 months in prison followed by a term on parole and all the permanent disadvantages of a criminal record, and between 15% and 20% will be convicted and placed on probation, with the same disadvantages of a criminal record. Less than 10% will be tried and acquitted of their draft-related offenses.

There is no statute of limitations which would benefit deserters or draft evaders because, under federal law, "no statute of limitations shall extend to any person fleeing from justice."¹⁵⁷ [D.L.R.]

PRESIDENTIAL OR CONGRESSIONAL AMNESTY

The penalties attached to the offenses of exiled deserters and draft evaders make it unlikely that a significant number of them will return to this country voluntarily. Moreover, the United States apparently cannot force the return of these exiles, and international agreements facilitating their return are probably not forthcoming. Consequently, if the decision is made that these exiles should be repatriated, perhaps the only means of doing so is to grant them amnesty in some form.

The question of amnesty for deserters and draft evaders has already provoked much discussion.¹⁵⁸ Groups which have recommended amnesty for draft evaders and/or deserters include a Michigan Democratic Convention,¹⁵⁹ a convention of Americans for Democratic Action,¹⁶⁰ and President Nixon's White House Conference on Youth.¹⁶¹ Presidential candidate George McGovern has announced that if elected, he will grant full and unconditional amnesty to draft evaders abroad or in jail.¹⁶² In addition, legislation concerning amnesty for draft evaders has been introduced in both houses of Congress. On Decem-

¹⁵⁴ *Id.* at 26.

¹⁵⁵ Comment, *Sentencing Selective Service Violators: A Judicial Wheel of Fortune*, Colum. J. Law & Soc. Prob. 164, 169 (1969).

¹⁵⁶ Even deserters who are convicted of desertion no longer lose their rights of citizenship. 8 U.S.C. § 1481(a) (8) (1970), which provided that rights of citizenship were forfeited upon conviction for desertion, was held unconstitutional by the Supreme Court in *Trop v. Dulles*, 356 U.S. 86 (1958). Four members of the Court characterized their loss of citizenship as cruel and unusual punishment violative of the 8th amendment to the Constitution.

¹⁵⁷ 18 U.S.C. § 3290 (1970).

¹⁵⁸ See, e.g., Reston, *A Proposal to the President: Vietnam Amnesty*, The New Republic, Oct. 9, 1971, at 21; Gara, *Amnesty and Reconciliation*, Friends Journal, Dec. 1, 1969, at 676; U.S. News and World Report, Dec. 1, 1969, at 15; N.Y. Times, July 9, 1971, at 30, col. 3; July 25, 1971, at 10, col. 4; letters to Rep. Koch, 116 Cong. Rec. (H.R.) 11ff. (daily ed. Jan. 21, 1970) at 116 Cong. Rec. (H.R.) 1035 (daily ed. Feb. 18, 1970).

¹⁵⁹ N.Y. Times, Aug. 24, 1970, at 13, col. 1.

¹⁶⁰ N.Y. Times, May 4, 1970 at 9, col. 1.

¹⁶¹ Task Force on the Draft, National Service, and Alternatives, White House Conference on Youth, *Recommendation V*, at 7 (1971). In addition, a group of 16 noted academicians recently petitioned the President and Congress for an amnesty for deserters and draft evaders. N.Y. Times, Oct. 19, 1971, at 31, col. 4.

¹⁶² Statement of Senator George McGovern, News Conference, Washington Press Club, Washington, D.C. Sept. 23, 1971.

ber 14, 1971, Senator Robert Taft, Jr., introduced a bill offering amnesty to draft evaders on the condition that they enlist for three years in the armed forces or perform three years of alternative government service.¹⁶³ Under this proposal convicted draft evaders could subtract up to two years' time served in prison from the three years' required service. Senator Edward Kennedy had previously suggested in his proposed Selective Service Act of 1971¹⁶⁴ that President Nixon study the appropriateness of amnesty for draft evaders. Congressman Edward I. Koch, (D-N.Y.), has recently introduced one bill¹⁶⁵ expanding the conscientious objector status within § 6(j) of the Selective Service Act¹⁶⁶ so as to include conscientious opposition to participation in a particular war, and another¹⁶⁷ providing that all persons in military service, in jail, or in exile be given the opportunity to return to full civilian status and claim exemption from military service as selective conscientious objectors. To date, no hearings have been held on any of these bills.

The purpose of this discussion is to define the scope of the pardoning power of the President and of Congress, to consider the ways in which this power has been exercised in the past, and to examine the factors confronting the President or Congress in deciding whether to grant amnesty to deserters and draft evaders in the near future. The term "amnesty" as used here refers to the remission of punishment with respect to a named class of offenders, without regard to their personal identities or individual circumstances. A "pardon," on the other hand, is a remission of punishment with respect to a named individual or a group of named individuals. A "partial" pardon or amnesty remits less than the full punishment, and a "conditional" pardon or amnesty makes the pardon or amnesty conditional on the performance or non-performance of specified acts.

A. The President's Power to Pardon¹⁶⁸

The Constitution gives the President the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."¹⁶⁹ The Supreme Court stated in *Ex Parte Garland* that except for impeachment, the President's pardoning power "extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."¹⁷⁰

In *Garland* the Supreme Court ruled that Congress cannot interfere in any way with the President's exercise of his power; it can neither limit the effect of a presidential pardon, nor exclude any persons from it.¹⁷¹ *Garland* concerned the petition of an attorney to practice in the federal courts without taking an oath prescribed by Congress.¹⁷² In taking the oath, Garland would have had to swear that he had never served in the Confederacy in any official capacity. He was unable to take this oath. In July of 1865, however, he received a full pardon from President Johnson for all offenses related to his par-

¹⁶³ S. 3011, 117 Cong. Rec. S21588-89 (daily ed. Dec. 14, 1971). See N.Y. Times, Dec. 15, 1971, at 4 col. 3. Senator Taft would have alternative service include VISTA, Veterans Administration hospitals, Public Health Service hospitals, and other services provided by appropriate regulation.

¹⁶⁴ S. 483, 117 Cong. Rec. S587-88 (daily ed. Jan. 29, 1971).

¹⁶⁵ H.R. 831, 92nd Cong., 1st Sess. (1971).

¹⁶⁶ 50 U.S.C. App. § 456(j) (1970). The Supreme Court recently construed this provision as not including persons who object to participation in a particular war. *Gillette v. United States*, 403 U.S. 437 (1971).

¹⁶⁷ H.R. 832, 92nd Cong., 1st Sess. (1971). See also, *Statement of Rep. Edward I. Koch, Hearings on the Extension of the Draft and Bills Related to the Voluntary Force Concept and Authorization of Strength Levels Before the House Comm. on the Armed Services*, 92nd Cong., 1st Sess. 507 (1971). Congressman Koch first publicly raised the issue of amnesty following a trip to Canada in 1969. See 116 Cong. Rec. H. R. 111 (daily ed. Jan. 21, 1970); N.Y. Times, Jan. 2, 1970, at 15, col. 1.

¹⁶⁸ See generally W. Humbert, *The Pardoning Power of the President* (1941); Comment, *The Pardoning Power of the Chief Executive*, 6 Ford. L. Rev. 255 (1937); Bonaparte, *The Pardoning Power*, 19 Yale L.J. 603 (1910); Jones, *Clemency in the United States Army*, 49 Case & Com., no. 2, 14 (Winter, 1943-44); Chapman, *Presidential Pardons*, 1957 J.A.G. J. 7 (May, 1957).

¹⁶⁹ U.S. Const. art. II, § 2.

¹⁷⁰ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

¹⁷¹ *Id.* at 381.

¹⁷² Act of July 2, 1862, ch. 128, 12 Stat. 502; Act of Jan. 24, 1865, ch. 20, 13 Stat. 424.

ticipation in the Confederate rebellion. The Supreme Court held that the congressional acts involved could not apply to Garland, for their application would restrict the President's power to pardon. Thus, the Court refused to limit the President's pardoning power as applied to the grave offense of treason. However, after *Garland* the question of the President's power to grant amnesty to a class of offenders, rather than a pardon to a named offender, presumably remained open.

1. The President's Power to Grant Amnesty

The President's power to grant amnesty was hotly contested during the Civil War and Reconstruction period. In 1862 Congress felt that it was necessary to authorize the President to grant amnesties, and it did so in an Act of July 17, 1862.¹⁷³ However, when President Lincoln proclaimed his first amnesty for Confederate supporters in 1863,¹⁷⁴ he denied that his authority to do was in any way derived from Congress, stating that the Constitution gave him "absolute discretion" in the matter.¹⁷⁵ President Johnson agreed with this position,¹⁷⁶ but in 1867 Congress repealed¹⁷⁷ its authorization in an attempt to prevent President Johnson from granting further amnesties to former Confederate personnel.¹⁷⁸ When President Johnson went ahead with a full, unconditional amnesty for all former Confederates in 1868,¹⁷⁹ the Radicals in Congress insisted that he had no authority to do so.¹⁸⁰ In 1869 the Senate Judiciary Committee submitted a report declaring that the President had no power to grant amnesties.¹⁸¹ Their reasoning was that there is a clear distinction between the concepts of pardon and amnesty; that the framers of the Constitution were aware of this distinction; and that they would have used both words if they had wanted to give the President the power to grant amnesties. A scholarly article of the time convincingly rebutted this argument and presented evidence of the intention of the members of the Constitutional Convention to include amnesties within the President's pardoning power.¹⁸²

The dispute culminated in the Supreme Court decisions of *United States v. Klein*,¹⁸³ and *Armstrong v. United States*.¹⁸⁴ In both cases claimants sought the recovery of property captured by Union forces during the Civil War. Congress had provided¹⁸⁵ for the restoration of such property if a claimant could prove that he had never given aid or comfort to the rebels. The Court ruled that since each claimant had benefitted from a presidential amnesty¹⁸⁶ restoring all property rights, prior loyalty to the Union need not be proven. In *Klein* the Court gave no weight to Congress' repeal¹⁸⁷ of its 1862 authorization¹⁸⁸ of presidential amnesties, stating that the original authorization was merely a "suggestion" and not "authority."¹⁸⁹ The Court further held unconstitutional a later Act of Congress¹⁹⁰ which barred evidence of presidential pardons or amnesties in support of any claim against the United States, on the ground that

¹⁷³ Ch. 195, § 13, 12 Stat. 589 (1862).

¹⁷⁴ Proc. of Dec. 1863, 13 Stat. 737.

¹⁷⁵ Thidd Annual Message to Congress, Dec. 8, 1863, 6 The Messages and Papers of the Presidents, 1789-1894, 188-89 (J. Richardson ed. 1896 [hereinafter cited as *Messages*]).

¹⁷⁶ Message to the Senate, Jan. 18, 1867, *id.* at 697.

¹⁷⁷ Act of Jan. 21, 1867, ch. 8, 14 Stat. 377.

¹⁷⁸ He had already granted two: Proc. of May 29, 1865, 13 Stat. 758; Proc. of Sept. 7, 1867, 15 Stat. 609.

¹⁷⁹ Proc. of Dec. 25, 1868, 15 Stat. 711.

¹⁸⁰ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2470, 2511-12, 2532-37, 2914-21 (1865); 39th Cong., 2nd Sess. 8, 9, 14, 15, 143-45, 267-69, 273-74 (1866).

¹⁸¹ S. Rep. No. 239, 40th Cong., 3rd Sess. (1869).

¹⁸² L. C. K., *The Power of the President to Grant a General Pardon or Amnesty for Offenses Against the United States*, (pts. 1-2, 8 Am. L. Reg. (New Series) 513, 577 (1869)).

¹⁸³ 80 U.S. (13 Wall.) 128 (1872).

¹⁸⁴ 80 U.S. (13 Wall.) 154 (1872).

¹⁸⁵ Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863).

¹⁸⁶ The deceased Wilson, whose estate was administered by Klein, had taken the oath required by President Lincoln's conditional amnesty of Dec. 8, 1863. See notes 174 and 175 *supra*. Mrs. Armstrong benefitted from the full and unconditional amnesty granted by President Johnson on December 25, 1868. See note 179, *supra*.

¹⁸⁷ See note 177 *supra* and accompanying text.

¹⁸⁸ See note 173 *supra* and accompanying text.

¹⁸⁹ 80 U.S. (13 Wall.) at 139.

¹⁹⁰ Act of July 12, 1870, ch. 251, 16 Stat. 235.

Congress could not change the effect of presidential pardons or amnesties.¹⁹¹ The Court ruled expressly in both *Klein*¹⁹² and *Armstrong*¹⁹³ that the President's power to pardon includes the power to grant amnesties; and the courts must give effect to such amnesties.

2 The President's Power to Grant Conditional Pardons and Amnesties

In addition to his power to grant pardons and amnesties, the President also has the power to grant conditional pardons or amnesties. In *Ex Parte Wells*¹⁹⁴ the Supreme Court upheld a pardon which President Fillmore had granted to a convicted murderer on the condition that he submit to imprisonment for life in place of his death sentence. The Court reasoned that the President's power to grant full pardons necessarily included the power to grant less than full pardons. Other examples of the federal courts' upholding of conditional pardons include *In Re Ruhl*,¹⁹⁵ in which the condition had been payment of certain fines and costs; *Kavala v. White*,¹⁹⁶ where the condition was deportation of the prisoner from the United States; and *United States v. Six Lots of Ground*,¹⁹⁷ where a prisoner was pardoned on the condition that he refrain from pressing certain claims against the government for land which had been confiscated. And although the Supreme Court has made few pronouncements in this area, it seems clear that the President has the authority to attach to a pardon any condition he wants, so long as the condition is not illegal in nature or impossible to fulfill.¹⁹⁸ If the grantee violates the condition, the pardon becomes void and the original penalty or prosecution is enforced.¹⁹⁹

The President's power to grant conditional amnesties, as opposed to conditional pardons, was upheld by the Supreme Court in *United States v. Klein*.²⁰⁰ Although the Court did not use the word "amnesty" in reaffirming the principle that the President can "annex to his offer of pardon any conditions or qualifications he should see fit,"²⁰¹ the presidential act which the Court enforced in *Klein* was a conditional amnesty.²⁰² Other conditional amnesties²⁰³ have been granted by American Presidents, and their power to grant them has never been questioned in the courts.

3. The Effects of a Full Presidential Pardon²⁰⁴

In *Ex Parte Garland*²⁰⁵ the Supreme Court stated that a full pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense . . . [I]t removes the penalties

¹⁹¹ 80 U.S. (13 Wall.) at 148. The Court also held the Act unconstitutional because of its interference with the judicial branch of the Government. In *Klein* the Act, as applied, could have opened up a final judgment of the Court of Claims which was made before the Act came into effect.

¹⁹² *Id.* at 147.

¹⁹³ 80 U.S. (13 Wall.) at 156.

¹⁹⁴ 59 U.S. (18 How.) 307 (1856).

¹⁹⁵ 20 F. Cas. 1335 (No. 12,124 (D.C. Nev. 1878)).

¹⁹⁶ 44 F.2d 49 (10th Cir. 1930).

¹⁹⁷ 27 F. Cas. 1097 (No. 16,299) (C.C. La. 1872).

¹⁹⁸ *Id.* at 1098. *Accord*, *Kavala v. White*, 44 F.2d 49, 51 (10th Cir. 1930).

¹⁹⁹ *People v. Potter*, 1 Parker Cr. Rep. 47 (N.Y. 1846); *People v. Burns*, 77 Hun. 92, 28 N.Y. Supp. 300 (Sup. Ct. 1894), *aff'd*, 143 N.Y. 665, 39 N.E. 21 (1894).

²⁰⁰ 80 U.S. (13 Wall.) 128 (1871). *See* pp. 115-16 *supra*.

²⁰¹ 80 U.S. (13 Wall.) at 142.

²⁰² *See* note 174 *supra* and accompanying text. The difference between the terms "pardon" and "amnesty" breaks down in the area of conditional amnesties because of the need for individual enforcement. For although the presidential proclamation is an "amnesty," pertaining to an entire class of offenders, each individual offender must report to the authorities to perform the condition attached to the amnesty, *e.g.*, to take an oath. When the condition is performed it is as if the offender received an individual pardon.

²⁰³ *See, e.g.*, Proc. of May, 1865, 13 Stat. 758 (Pres. Johnson, relettering Pres. Lincoln's amnesty proclamation of 1863); Proc. of Jan. 4, 1893, 27 Stat. 1058 (Pres. Harrison, regarding amnesty for Mormons convicted of bigamy, polygamy and unlawful cohabitation); Proc. of Sept. 25, 1894, 28 Stat. 1257 (Pres. Cleveland, relettering Pres. Harrison's amnesty proclamation of 1893).

²⁰⁴ *See* Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647 (1915); Note, *Legal Effect of a Pardon*, 13 Colum. L. Rev. 418 (1913).

²⁰⁵ 71 U.S. (4 Wall.) 333 (1866).

and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."²⁰⁶ Presumably, this rationale applies as well to a full amnesty. The Supreme Court, in discussing the legal effects of President Johnson's full and unconditional amnesty of 1868,²⁰⁷ stated in *Knote v. United States*²⁰⁸ that "the distinction between [pardon and amnesty] is one rather of philological interest than of legal importance."²⁰⁹

Although an amnesty or pardon "restores [the grantee] to all his civil rights," the restoration of rights is not absolute.²¹⁰ A pardon or amnesty will not result in any compensation by the government for punishment suffered prior to the pardon or amnesty,²¹¹ nor will it affect any rights vested in a third party as a result of the pardoned offense.²¹² In addition, a pardon or amnesty will not restore certain legal rights. For example, the pardoned offense may be raised in some jurisdictions in order to impeach a witness²¹³ or to reject an application for citizenship.²¹⁴ Public offices which have been forfeited because of pardoned offenses might not be restored.²¹⁵ Generally, however, the rights to vote, hold public office, and serve on juries, and most other basic rights attached to United States citizenship, are restored by a full pardon or amnesty, or by a pardon or amnesty declaring such rights to be restored.²¹⁶ Obviously a pardon cannot prevent the operation of veiled social discrimination against the grantee such as ostracism or difficulty in obtaining employment.

B. Congress' Power To Enact Amnesties

The scope of Congress' pardoning power is less clear than the scope of the President's power, primarily because Congress has rarely exercised its power.²¹⁷ In 1893 Congress enacted an amnesty granting immunity from prosecution to all witnesses testifying before the Interstate Commerce Commission.²¹⁸ In *Brown v. Walker*,²¹⁹ the Supreme Court held that this act did have the full effect of an amnesty, and that a subpoenaed witness could not therefore be excused from testifying on the ground that he might incriminate himself. The court stated that although the Constitution vests the pardoning power in the President, "this power has never been held to take from Congress the power to pass acts of general amnesty."²²⁰ The reasoning behind this conclusion was not made clear by the Court, although the Court implied that

²⁰⁶ *Id.* at 380-81. See *Knote v. United State*, 95 U.S. 149, 153 (1877).

²⁰⁷ See note 179 *supra*.

²⁰⁸ 95 U.S. 149 (1877).

²⁰⁹ *Id.* at 153.

²¹⁰ See Willston, *supra* note 204.

²¹¹ *Knote v. United States*, 95 U.S. 149, 153-54 (1877) (dictum).

²¹² *Id.* at 154. *Knote* should be distinguished from *Klein* and *Armstrong*, *supra* notes 183-84, where the property petitioners sought had not vested in a third party but was being held by the U.S. Treasury pursuant to statute. See also W. Humbert, *supra* note 168, at 79; Cozart, *The Benefits of Executive Clemency*, 32 Fed. Prob. no. 2, 33 (June, 1968).

²¹³ *Bennett v. State*, 24 Tex. Ct. App. R. 73 (1877); see Magulre et al., *Evidence* 321 (1965), and cases cited therein.

²¹⁴ *In re Spenser*, 22 F. Cas. 921 (No. 13, 234) (C.C. Ore. 1878).

²¹⁵ 215 State v. Carson, 27 Ark. 469 (1872).

²¹⁶ Cozart, *supra* note 212. Of course, partial or conditional pardons or amnesty may, by their very nature, operate to deny legal rights. See, e.g., *Ex Parte Wells*, *supra* note 194, where the Supreme Court affirmed the pardon of a convicted murder condition upon submission to life imprisonment.

For a list of those civil rights which are lost by convictions of various crimes, see Federal Probation Officers Assoc., *A Compilation of State and Federal Statutes Relating to Civil Rights of Persons Convicted of Crime* (1960).

²¹⁷ Congress has granted amnesty only four times, and each of these amnesties was limited in scope. Three were partial amnesties removing only civil or political disabilities. Act of May 22, 1872, ch. 193, 17 Stat. 142 (removing political disabilities imposed by the third section of the 14th Amendment to the Constitution); Act of May 13, 1884, ch. 46, 23 Stat. 21 (lifting certain disqualifications on grand and petit jurors); Act of June 6, 1893, ch. 389, 30 Stat. 432 (removing all political disabilities imposed by the third section of the 14th amendment). One was a full amnesty benefiting a small class of persons. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (providing for immunity from prosecution for persons testifying before the ICC).

²¹⁸ Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

²¹⁹ 161 U.S. 591 (1896).

²²⁰ *Id.* at 601.

the amnesty power, commonly exercised by the English Parliament, had been traditionally derived from the legislature's "sovereign power."²²¹

Certain questions with respect to the congressional pardoning power remain unanswered by the Supreme Court. For example, it is not clear whether Congress has the power to grant pardons in addition to amnesties. The concepts of pardon and amnesty are often clearly distinguished by scholars who place the individual pardon power in the province of the President alone²²² by emphasizing the legislative character of an amnesty,²²³ which takes away the consequence of a particular offense without regard to who the offenders are. The predominant view, however, seems to be that Congress' pardoning power includes both amnesties and pardons,²²⁴ since a distinction between the two has never been made in Anglo-Saxon law. Moreover, the Supreme Court has upheld, in *The Laura*,²²⁵ the remission of a fine by the Secretary of the Treasury pursuant to Congressional authorization.²²⁶ The Court ruled that the President's power to pardon offenses and remit penalties was not exclusive, and that Congress had frequently authorized subordinate officers to remit fines and penalties.²²⁷ Since the remission of a fine is nearly equivalent to a pardon,²²⁸ if Congress can delegate Government officials the power to remit fines, it seems to follow that Congress itself has the power to grant pardons.

Another question concerns the extent to which Congress can interfere with the President's exercise of his pardoning power.²²⁹ The courts have held that Congress cannot restrict in any way the effects of a presidential pardon.²³⁰ They have never said that if a President deliberates and decides against an amnesty, Congress may not enact one itself. It seems clear that both the President and Congress have certain pardoning powers; within the scope of their respective powers, each could expand on an amnesty granted by the other if it was deemed insufficient, but neither could limit the effects of the other's amnesty. The problems which might arise would probably be more political than constitutional.²³¹

It should be noted, in conclusion, that from a practical point of view, the President is in a superior position to grant pardons and amnesties. He can

²²¹ *Id.* Of course, Congress could not be said to have the same degree of "sovereign power" as the English Parliament, since in this country, unlike England, the legislature is subject to limitations imposed by the Constitution and the doctrine of separation of powers.

Whatever doubt might arise concerning Congress' power to grant an amnesty outright to draft evaders and deserters could probably be avoided if Congress were to make the amnesty ancillary to other Congressional legislation relevant to the change from wartime to peacetime. For Congress does have the power to abate prosecutions by means of legislations subsequent to the performance of unlawful acts. In *Hamm v. Rock Hill*, 379 U.S. 306 (1964), for example, the Supreme Court held that after the enactment of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2001a (1970), states could not prosecute participants in sit-ins even though the sit-ins preceded the enactment of the Civil Rights Act and were at the time unlawful under state law. Similarly, if Congress were to enact Congressman Koch's bills, notes 165 and 167 *supra*, broadening the scope of the conscientious objector (C.O.) status, it could presumably grant amnesty, or abatement from prosecution, for all draft evaders whose objection to the war would have placed them within the new C.O. status. And since it would be extremely difficult to separate this class of offenders from all others, Congress could grant amnesty to *all* draft evaders, as part of its enactment affecting the C.O. status.

²²² See, e.g., Radin, *Legislative Pardons: Another View*, 27 Calif. L. Rev. 387, 391 (1939); Barnett, *Executive, Legislature, and Judiciary in Pardon*, 49 Amer. L. Rev. 684, 693-698 (1915).

²²³ It has been suggested that the procedure Congress would follow in granting an amnesty would be similar to its procedure in repealing or modifying a law. W. Humbert, *supra* note 168. For example, if Congress granted amnesty to draft evaders after determining that it was no longer just or expedient to enforce the punishment provisions of the Selective Service Act (5; U.S.C. App. § 462 (1970)), then Congress would, in effect, be repealing or suspending retrospectively that portion of the Act.

²²⁴ See, e.g., Weihofen, *Legislative Pardons*, 27 Calif. L. Rev. 371, 381 (1939).

²²⁵ 174 U.S. 411 (1885).

²²⁶ Act of Feb. 28, 1871, ch. 100 § 64, 16 Stat. 458.

²²⁷ 114 U.S. at 413-15. The Court noted that it had previously upheld a similar congressional authorization in *United States v. Norris*, 25 U.S. (10 Wheat.) 246 (1825).

²²⁸ A remission of a fine may not go so far as to "blot out" the offense and make the offender as innocent as if he had never committed the offense, *See* p. 118 *supra*. The offender is relieved of his duty to pay the fine, but presumably the original records of the offense remain. However, since even a full pardon falls short of making the offender "a new man", (*see* p. 118 *supra*), there would appear to be little practical difference between a pardon and the remission of a fine.

²²⁹ W. Humbert, *supra* note 168, at 44-45.

²³⁰ *See* p. 117 *supra*.

²³¹ For example, the President might oppose congressional amnesty if he himself had deliberated and decided against such an amnesty. In this case, he might veto a congressional amnesty, but Congress might then override the President's veto. Of course, once a congressional amnesty became law, the President could not limit its scope.

command studies and assemble data more efficiently than Congress, and he can arrive at decisions quickly without making the sacrifices necessary in political bargaining.²³² Perhaps this is why Congress has enacted so few amnesties, while American presidents have granted numerous amnesties throughout this country's history.

C. Amnesties Granted by American Presidents

The executive amnesty power was exercised on several occasions during the early decades of this nation's history.²³³ Between 1807 and 1830, five amnesties were granted to deserters from the armed services.²³⁴ The condition most commonly attached to these amnesties was that a deserter turn himself in to a Commanding Officer within a certain time and fulfill the remainder of his term of duty.²³⁵ Although two or three of these amnesties were proclaimed in order to raise troop levels for oncoming conflicts, it appears that at least two of the amnesties for deserters had forgiveness as their only motive.²³⁶

During the Civil War and Reconstruction extensive use was made of the President's amnesty power. On March 10, 1863, President Lincoln proclaimed amnesty and full restoration to rights and duties for all soldiers absent without leave from the Union forces, provided they returned to their respective units within 21 days.²³⁷ Later that year the President granted the first broad amnesty benefitting Confederate rebels, his motive being to weaken the morale of the South and cause its soldiers to desert.²³⁸ This amnesty²³⁹ of December 8, 1863, extended to all persons who participated either directly or indirectly in the Confederate cause a restoration of all civil and property rights,²⁴⁰ on the condition that they take an oath to support the Constitution and the Union. Since the Union forces were definitely on the upswing militarily at that time,²⁴¹ tens of thousands of demoralized Confederates were easily enticed into taking the oath of allegiance to the Union.²⁴² Lincoln's amnesties thus extended not only to Union deserters but to citizens who had committed the treasonous act of enlisting in the ranks of the enemy.

Two proclamations of amnesty during the Civil War period are of particular interest as precedents for a possible amnesty in the near future. On March 11, 1865, when the Civil War was nearly over, President Lincoln granted amnesty to all Union deserters who would return to their posts within 60 days and serve the remainder of their military tours of duty plus a period of time equal to their unauthorized absence.²⁴³ With the war almost ended, and with a generous period of time²⁴⁴ in which to return to duty, it appears that this am-

²³² W. Humbert, *supra* note 168, at 45.

²³³ President Washington first exercised the executive amnesty power in 1795 following the Whiskey Rebellion, a disorderly demonstration by Western Pennsylvania residents protesting the federal excise tax on whiskey. The President proclaimed an amnesty for all parties involved for their offense of treason on the condition that they give assurances of submission to the laws of the United States. 1 *Messages*, *supra* note 175, at 181. Five years later President Adams granted a similar amnesty to participants in a small Massachusetts insurrection. 1 *Messages* 303.

In 1807, President Jefferson proclaimed a full pardon for all deserters from the U.S. Army who had sought shelter outside the jurisdiction of the courts-martial. 1 *Messages* 425. The condition attached to this amnesty was that each deserter simply turn himself in to any Command Officer within four months and resume his military duties. Amnesties identical to Jefferson's were proclaimed by President Madison on Feb. 7, 1812, and Oct. 8, 1812, ostensibly to raise the troop levels to fight the British. 1 *Messages* 512, 514. A fourth amnesty of the same nature was proclaimed by President Madison on June 17, 1814. 1 *Messages* 543. Finally, an executive order of June 12, 1830, issued by John H. Eaton, President Jackson's Secretary of War, pardoned all deserters previously indicted or convicted and allowed them to return to duty, and discharged and pardoned all deserters at large provided that they would never again serve in the army. 2 *Messages* 449.

²³⁴ *See id.*

²³⁵ *Id.*

²³⁶ The amnesties of June 17, 1814, and June 12, 1830, would seem to have had no tactical significance, since at the time they were granted the nation was not preparing for war. *See id.*

²³⁷ 6 *Messages* 163.

²³⁸ J. Dorris, *Pardon and Amnesty Under Lincoln and Johnson* 28 (1953) [hereinafter cited as *Dorris*].

²³⁹ Proc. of Dec. 8, 1863, 13 Stat. 737.

²⁴⁰ Of course, property rights as to slaves no longer recognized by the Union, were not restored.

²⁴¹ Lincoln, *Third Annual Message to Congress*, Dec. 8, 1863. 6 *Messages* 188.

²⁴² *Dorris* 62-63.

²⁴³ 6 *Messages* 278.

²⁴⁴ 21 days were allowed for return to duty in the Proc. of Mar. 10, 1863, *supra* note 237.

nesty was proclaimed less for tactical reasons than for reasons of forgiveness and to avoid future divisiveness and dislocation of American citizens. Likewise, President Johnson's amnesty of May 29, 1865,²⁴⁵ which was announced after the war had formally ended, evinced a desire to forgive the offense of treason and to bring Southerners back into a free and productive role within the Union. In his Proclamations of September 7, 1867 and July 4, 1868,²⁴⁶ President Johnson extended amnesty to classes of persons excluded from previous amnesties.²⁴⁷ On December 25, 1868, he proclaimed amnesty "unconditionally and without reservation, to all and to every person who directly or indirectly, participated in the late insurrection or rebellion, and a full pardon and amnesty for the offense of treason against the United States."²⁴⁸ Among the 37 Confederate leaders finally pardoned by this extension of amnesty were Jefferson Davis and General Lee, Rooney, Custis, and Fitzhugh Lee.²⁴⁹

Draft evaders and deserters benefited from no amnesties during or after World War I.²⁵⁰ However, thirty persons convicted under the Espionage Act²⁵¹ for obstruction of the draft received a commutation of their sentences to the time already served on December 15, 1923.²⁵² These pardons granted by the President were the culmination of almost two years of controversy which began before the House Judiciary Committee in March, 1922.²⁵³ Since the issues of this draft-related dispute are arguably relevant to the issue of amnesty today, it is worthwhile to mention at least the resolution of the Espionage Act cases.

Several thousand persons were originally convicted and sentenced to prison²⁵⁴ under the Espionage Act, which imposed a fine of \$10,000 or imprisonment of up to 20 years for a willful attempt to cause disloyalty within the armed services or obstruction of the draft.²⁵⁵ During the postwar years most of these offenders had their sentences commuted on an individual basis to the time already served.²⁵⁶ At the time of the congressional hearings, only 113 offenders remained in prison; well over half of these were serving sentences of five years or more, and 11 were serving the full 20 years.²⁵⁷ The American Civil Liberties Union advanced two major arguments in behalf of these 113 offenders. First, none of the offenders had ever been an agent of the enemy, and their convictions were based not on violent acts but solely on acts involving speech and writing.²⁵⁸ Second, the offenses were of a political, not criminal nature, and since the war and the need for enforcement of the Espionage Act had ended, these persons should be pardoned.²⁵⁹ The hearings resulted in no congressional action. However, the President did appoint a commission to study all cases individually, and the recommendations of this commission were the basis of the President's pardons of December 15, 1923.²⁶⁰

Perhaps the most important precedent in this country's history for granting pardons or amnesty to deserters and draft evaders is the action which President Truman took with respect to draft violators shortly after the close of World War II. On December 25, 1946, he created by executive order²⁶¹ the

²⁴⁵ Proc. of May 29, 1865, 13 Stat. 758.

²⁴⁶ 15 Stat. 699 (1867) and 15 Stat. 792 (1868).

²⁴⁷ See Pres. Lincoln's Proc. of Dec. 8, 1863, *supra* note 239; Pres. Johnson's Proc. of May 29, 1865, *supra* note 245.

²⁴⁸ Proc. of Dec. 25, 1868, 15 Stat. 711.

²⁴⁹ *Dorris* 311.

²⁵⁰ After both World Wars, amnesty was extended to deserters with respect to the restoration of rights of citizenship. Proc. of Mar. 5, 1924, 43 Stat. Pt. 11 1940; Proc. of Dec. 31, 1952, 17 Fed. Reg. 11833. However, these partial amnesties applied only to persons who had deserted after hostilities had ended and before Congress had declared the wars to be over. Since citizenship may be forfeited by desertion only during wartime, 8 U.S.C. § 1481(8) (1970), these amnesties gave peacetime deserters only what was already due them.

²⁵¹ Act of June 15, 1917, ch. 30, 40 Stat. 217, as amended ch. 75, 40 Stat. 553.

²⁵² 1924 Att'y Gen. Ann. Rep. 337. One of the released convicts was Eugene V. Debs.

²⁵³ *Hearings Before the House Comm. on the Judiciary*, 67th Cong., 2nd Sess. (1922) [hereinafter cited as *Espionage Act Hearings*]. See also 62 Cong. Rec. 277, 8352, 13178 (1919).

²⁵⁴ *Espionage Act Hearings* 2.

²⁵⁵ Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217.

²⁵⁶ *Espionage Act Hearings* 2.

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.* at 2.

²⁵⁹ *Id.* at 9.

²⁶⁰ See note 252 *supra*.

²⁶¹ Exec. Order 9814, 1946 Fed. Reg. 14645 (1946).

three-man President's Amnesty Board²⁶² to examine the cases of all persons convicted of violating the Selective Training and Service Act of 1940.²⁶³ The Board submitted its report within a year, and, as a result of its recommendations, the President granted full pardons to 1523 of the 15,805 offenders.²⁶⁴

The most striking aspect of the President's Amnesty Board was that while it was confronted with over 15,000 cases of selective service violations, it decided to consider each case individually. The question of granting a general amnesty was discussed by the Board at the outset, but they decided unanimously not to recommend an amnesty for two reasons. First, they realized that there were many flagrant criminals among the violators, persons whose draft violations stemmed from larger crimes.²⁶⁵ Second, the Board decided that the presidential mandate to "examine and consider the cases of all persons convicted . . ." ²⁶⁶ gave rise to a strong inference that the President intended the cases to be dealt with individually.²⁶⁷

In dealing with the cases individually, the members of the Board had the assistance of 16 full-time attorneys²⁶⁸ who compiled data concerning the family history, school and work records, criminal records, and selective service history of each offender. In considering this data the Board used no specific standards or formulae. They took all mitigating circumstances into consideration, such as ill health in the family, other family problems, illiteracy, or lack of understanding of obligations under the Selective Service Act.²⁶⁹ Each offender under consideration had the opportunity to file a brief and appear at a hearing to state his case. Various organizations also testified at the hearings.²⁷⁰

In some ways the President's Amnesty Board seemed to be little more than an appeals board, correcting the mistakes of prior court rulings and taking mitigating circumstances into consideration where the court failed to consider them.²⁷¹ However, a former Board member maintains that the Board went well beyond the role of an appeals board and recommended pardons for hundreds of men who, to his mind, had no "right," under the laws as they existed then, to be spared punishment.²⁷²

D. Factors Confronting Congress and the President in Their Decision on Amnesty

1. Practical Considerations Surrounding the Options Available to Congress and the President

It is clear that both Congress and the President have a number of options available to them for dealing with draft evaders and deserters. Each has the apparent authority to pardon any individual offender or class of offenders.²⁷³

²⁶² The members of the Board were the Hon. Owen J. Roberts, former Justice of the United States Supreme Court; Mr. Willis Smith, former Pres. of the American Bar Assoc.; and Mr. James F. O'Neill, former Police Chief of Manchester, N.H.

Note the misnomer of "Amnesty Board," since the Board was asked to consider individual cases and recommend individual pardons. See text at note 266.

²⁶³ Ch. 720, 54 Stat. 885 (1940).

²⁶⁴ Proc. of Dec. 23, 1947, 62 Stat. 1441.

²⁶⁵ Arguably this should have had no bearing on the question of whether or not to grant a general amnesty, for those offenders simultaneously guilty of more serious crimes could still serve their sentences for these crimes. All that would be remitted by an amnesty for draft offenders would be the additional sentence resulting from the draft offense. Clearly, the Board thought that this class of draft offenders was morally less deserving.

²⁶⁶ 1946 Fed. Reg. 14645.

²⁶⁷ Interview with Mr. James F. O'Neill, Member of the President's Amnesty Board, July 27, 1971 [hereinafter cited as *Interview*, July 27, 1971].

²⁶⁸ Letter from Mr. W. Naramore, head of the staff of independent attorneys assisting the President's Amnesty Board, Aug. 12, 1971, on file at the Harvard International Law Journal. These attorneys received the cooperation of the Justice Department; they were paid at first by a White House emergency fund, later by the Justice Department.

It is interesting to note that, with respect to the amount of time which must have been spent on each case, the members of the President's Amnesty Board met only on weekends and holidays and provided their services on a voluntary basis. *Interview*, July 27, 1971.

²⁶⁹ *Interview*, July 27, 1971.

²⁷⁰ *Id.*

²⁷¹ The Board was criticized for not recommending pardons for a greater percentage of the draft offenders. In addition, it was criticized for arbitrariness, lack of standards, and discrimination against Jehovah's Witnesses and other self-proclaimed ministers or conscientious objectors. See, e.g., Statement of the Rev. A. J. Muste, Chrm., Comm. for Amnesty, on the Pardons Granted by President Truman, Dec. 23, 1947 (1948).

The overall response to the Board's recommendations was, however, favorable. *Interview*, July 27, 1971.

²⁷² *Interview*, July 27, 1971.

²⁷³ Congress' authority to grant pardons to named individuals has not been exercised or tested in the courts. See pp. 119-20 *supra*.

In addition, each can grant a partial pardon or amnesty, remitting only part of the punishment suffered for an offense. Likewise, each can attach conditions to any pardon or amnesty. Finally, it follows logically that different individuals or different classes of offenders can be dealt with in different ways, if there are compelling reasons to do so.

Before deciding on a given course of action with respect to draft evaders and deserters, Congress or the President would have to consider the practical problems and consequences of the various options open to them. Clearly the creation of a pardon board similar to President Truman's Amnesty Board would pose the greatest number of administrative difficulties. For whereas the Truman Board was dealing with 15,805 known persons within the United States who had all been convicted and about whom much data became available, today there are few records of the numbers, identity, and whereabouts of these exiles. Finding a way to make the exiles known to the pardon board, to compile a complete dossier on each individual, and to allow the exiles to submit to the "jurisdiction" of the pardon board without simultaneously submitting themselves to prosecution for their offense²⁷⁴ would involve an extremely complicated process. In addition, the lack of well-defined standards and the limited amount of time²⁷⁵ given each case under the Truman Board suggest that the outcome in certain cases must have been highly arbitrary. Although clearer standards might be provided for a board operating today, the larger number of draft evaders makes it unlikely that such a board, regardless of the machinery made available to it, could have the time to reach a well-considered result in individual cases.

These administrative difficulties might be avoided with an amnesty, granted without regard to individual circumstances. However, an amnesty would give rise to other difficult questions. First, how would one define the class or classes of offenders entitled to receive amnesty? Should deserters be included in the same amnesty with draft evaders, and should deserters and draft evaders in exile be treated differently from their counterparts in jail? Second, are there means of further subdividing these broad classes of offenders for purposes of treating different groups in different ways? Individual motives and the degree to which one might be considered a conscientious objector might be meaningful factors in defining the scope of an amnesty. However, such factors cannot be used to limit the scope of an amnesty because by definition an amnesty takes no individual circumstances into account. It defines those to be pardoned according to the external aspects of the offense committed without regard to the identity or personal circumstances of the individuals involved.²⁷⁶

Further questions pertain to the conditions to be attached to an amnesty, and the means to be relied on for enforcing them. One suggestion would be to require draft evaders to submit to induction in the armed services, or to perform two or more years of some form of alternative service, as a condition to receiving the benefits of an amnesty.²⁷⁷ Likewise, deserters might be required to return to their posts and to serve a period of time equal to the remainder of their term plus the length of their unauthorized absence, a condition attached to 19th-century amnesties for deserters.²⁷⁸ A variation of this plan might allow deserters to serve the required period of time in non-combat military service. All of the above conditions would have the advantage of being easily enforceable, since the agents of enforcement, the armed services for those who submit to induction or return to duty, and the draft boards for those who choose alternative service, are already in existence. In addition, the administration of an amnesty would be facilitated by attaching as a condition

²⁷⁴ This last consideration is important in order to entice exiled deserters and draft evaders to take advantage of the pardon board.

²⁷⁵ Given that the Board met only on weekends and holidays, note 268 *supra*, and that 15,805 cases were considered over the course of about one year, the Board must have devoted to each individual case an average of less than five minutes.

²⁷⁶ An amnesty might take into account whether or not a self-declared conscientious objector took steps to become classified as a C.O., since this would be one of the "external aspects" of the particular offense by which an amnesty might define the class of offenders to be pardoned. However, such a factor would not be a meaningful means of limiting the scope of an amnesty.

²⁷⁷ This suggestion has been made by Mr. James F. O'Neill, member of the President's Amnesty Board of 1947. *Interview*, July 27, 1971. Cf. Senator Taft's amnesty bill, *supra*, note 163.

²⁷⁸ See pp. 121-22 & note 233 *supra*.

the requirement that exiles report to designated border posts or military bases within a given time period to benefit from the amnesty.²⁷⁹

2. Policy Considerations

The administrative details of an amnesty or even a pardon board could be resolved if Congress or the President decided to grant some form of amnesty or pardons. The more immediate question is whether Congress or the President will ever make this decision, and what policy considerations will influence them in their decision.

Policy considerations weighing against an amnesty or pardons include, first, the notion that law breakers ought not to be forgiven, particularly where their offense has, in one sense, imperiled the lives of those who took their places.²⁸⁰ Second, an amnesty might cause a decline in morale and discipline within the armed services, thereby weakening military effectiveness.²⁸¹ Third, an amnesty might make it difficult to operate a military draft in the future, since future draftees would consider it inequitable to be required to serve in the armed forces when persons who had previously refused to serve had eventually been excused.²⁸² Finally, with respect to pardons or amnesty for deserters, objection might be raised to interference by Congress or by the President with military justice,²⁸³ particularly after the recent controversy over the President's alleged intrusion into the Calley case.²⁸⁴

Policy considerations in favor of pardons or amnesty include, first, the desirability of bringing back to this country thousands of exiles whose presence abroad is a reminder to Americans and to the rest of the world that this country pursued in Indochina a course of conduct unacceptable to many of its young citizens. Second, the repudiation of the war by many American political

²⁷⁹ This again was part of Mr. O'Neill's suggestion. See note 277 *supra*.

²⁸⁰ One could argue of course, that because of their attitudes draft evaders and deserters would have made terrible soldiers and would have caused even greater risks at the battlefield.

²⁸¹ It is unclear, however, to what extent an amnesty would cause a decline in morale and discipline, since morale and discipline are already at an extremely low ebb, largely because of anti-war sentiment within and without the armed services. See N.Y. Times, Sept. 5, 1971, at 1, col. 1; Oct. 26, 1970, at 1, col. 3; June 21, 1970, at 1, col. 5. The morale problem manifests itself not only in in-service anti-war sentiment (see note 285 *infra*), but in the high rate of desertion (see note 6 *supra*), the low rate of re-enlistments (see N.Y. Times, Dec. 11, 1970, at 93, col. 6), and the growing problem of drug addiction (see N.Y. Times, May 17, 1971, at 1 col. 1). As early as 1967, one man in 32 was absent without leave from the armed services at same time during the year. Testimony of A. Fitt, Ass't Sec. of Defense, *Hearings Before a Subcomm. on the Treatment of Deserters from the Military of the Senate Comm. on Armed Services*, 90th Cong., 2nd Sess. 3 (1968).

Given the tremendous amount of anti-war sentiment in the United States, and the fact that the President himself is trying to cut back our involvement in Indochina by pulling out troops (see note 285 *infra*), it is already clear to some servicemen in Indochina that they are being asked to endanger their lives for very little; there is little more harm that an amnesty could do to the morale of these servicemen. However, it cannot be denied that a significant number of servicemen do feel or would like to feel that they are making a positive contribution to a worthwhile cause; the morale of these men might well suffer if an amnesty were granted.

²⁸² It is interesting to note that President Truman's Amnesty Board never found this consideration to be compelling. *Interview*, July 27, 1971. Of course, the Board pardoned only 1523 offenders out of 15,805, and all of these 1523 had been convicted and had presumably served part or all of their sentence.

The difficulty of operating a military draft would be alleviated by making an amnesty conditional on submitting to induction into the armed services. (See pp. 126-27 *supra*). An all-volunteer army would also eliminate draft problems. President Nixon has set a goal of a volunteer army by 1973. See President Nixon's Message to Congress, Jan. 28, 1971, N.Y. Times, Jan. 29, 1971, at 1, col. 4.

In addition, it is arguable that most of those who refused to serve in Indochina for moral reasons would not refuse to serve in wars of less questionable justification, or which the security of the nation was directly at stake.

²⁸³ The military establishment would, of course, have no legal cause for objecting, since the pardoning power of the President extends to offenses under the jurisdiction of the courts-martial, even apart from the President's powers as Commander-in-Chief. See Chapman, *Presidential Pardons*, 1957 J.A.G. J. 7 (May, 1957). Likewise, since the Uniform Code of Military Justice, which contains the provisions of law relating to the offense of desertion, was enacted by Congress, the congressional pardon power extends to offenses under the U.C.M.J. for the same reasons as it extends to offenses under other congressional enactments. See pp. 118-20 *supra*.

²⁸⁴ The President permitted Lt. Calley to remain in his apartment, contrary to the order of the court-martial which sentenced him to the stockade (see N.Y. Times, April 2, 1971, at 1, col. 8), and promised to "review" Lt. Calley's case after it had gone through the appeals process (see N.Y. Times, Apr. 4, 1971, at 1, col. 8).

and social leaders²⁸⁵ has served to accentuate the moral dilemma, more so than in past conflicts, of whether or not to serve in the armed forces; arguably deserters and draft evaders who acted in response to this dilemma are not the type of law breakers whom this country should seek to punish.²⁸⁶ Third, a failure to grant pardons or amnesty might be considered inconsistent with the traditions of this country. Not only are there numerous precedents for amnesty in United States history, but the historic role of this nation is that of a free land to which exiles from other lands have frequently turned; it would be ironic for such a nation to bar its exiles from returning to a free and productive life within the United States. A fourth consideration would involve the diplomatic advantages which might inhere in an amnesty, since countries such as Canada and Sweden, to the extent that they are burdened by the presence of American exiles, would presumably welcome an amnesty. Finally, there are at present certain administrative policies in dealing with deserters and draft evaders²⁸⁷ which closely resemble partial or conditional amnesty, except for the haphazard way in which they are administered; an official amnesty (or pardon board) could at least apply more uniform standards to these offenders.

²⁸⁵ Congressmen and Senators have spoken out against the war on countless occasions (see, e.g., N.Y. Times, Apr. 23, 1971, at 6, col. 4) and have introduced a number of bills and resolutions accordingly. See, e.g., Vietnam Disengagement Act of 1971, S. 376, 92nd Cong., 1st Sess. (1971); S.J. Res. 89, 92nd Cong., 1st Sess. (1971); H.R. Con. Res. 39, 92nd Cong., 1st Sess. (1971); H.R. Res. 54, 92nd Cong., 1st Sess. (1971). The President himself is pursuing a policy of troop withdrawal from Indochina. See, e.g., N.Y. Times, Nov. 13, 1971, at 1, col. 8; Nov. 14, 1971 § IV, at 1, col. 4.

Within the armed services anti-war feeling has manifested itself in demonstrations underground newspapers, and political meetings in coffeehouses. See generally, N.Y. Times, Sept. 2, 1969, at 1, col. 8; May 18, 1969, § VI, at 25; Apr. 6, 1969, at 2, col. 3. Even officers' groups have been formed to speak out against the war. See, e.g., N.Y. Times, Oct. 23, 1970, at 22, col. 5; Sept. 27, 1970, at 19, col. 1. In 1969 the Army was forced to issue a memo, *Guidance on Dissent*, instructing commanding officers to impose only such minimum requirements as were necessary to enable the Army to perform its mission. N.Y. Times, Sept. 12, 1969, at 1 col. 8. In addition, more and more servicemen are seeking discharges or assignment to non-combat duties (see N.Y. Times, Mar. 22, 1971, at 25, col. 1), an option opened up by Department of Defense Directive 1300.6 (1962). See Cusick, *In-Service Conscientious Objection: Problems of the Growing Privilege*, 1970 J.A.G. J. 35 (Sept., 1970); N.Y. Times, May 2, 1971, at 14, col. 1; Apr. 13, 1971, at 16, col. 5; Mar. 31, 1971, at 18, col. 8; Aug. 30, 1970, at 35, col. 1.

A number of veterans of the conflict in Indochina have opposed the war. For example, the Vietnam Veterans Against the War received a great deal of publicity due to "war crimes hearings" in Detroit (see The New Republic, Feb. 27, 1971, at 16); their demonstrations in Washington (see N.Y. Times, Apr. 25, 1971, § IV, at 1, col. 1), and their testimony before the Senate Foreign Relations Committee (see N.Y. Times, Apr. 13, 1971, at 1, col. 5; Barry, *Why Veterans March Against the War*, N.Y. Times, Apr. 23, 1971, at 31, col. 5).

²⁸⁶ Professor L. Boudin has reasoned that if we cannot, for practical reasons, hold the leaders of this nation responsible for the war crimes (i.e., violations of international law) perpetrated in Indochina, then we should not hold deserters and draft evaders liable for their violations of our domestic laws. Statement of Leonard B. Boudin, Esq., Public Forum on "The Legal Responsibility of the Individual," sponsored by the American Society of International Law, Oct. 7, 1971, Washington, D.C.

One class of draft evaders abroad is especially deserving of some form of amnesty. This class consists of evaders who, prior to summer, 1970, refused to serve in the armed forces because of their objection to war in any form, but whose objection to war did not stem from traditional religious beliefs. In *Welsh v. United States*, 398 U.S. 333 (1970) the Supreme Court virtually eliminated the requirement that conscientious objection to war be based on religious training and beliefs. The Court ruled that moral and ethical beliefs, it held "with the strength of traditional religious conviction," could be the basis of the opposition to war. *Id.* at 339-40. See Note, *Conscientious Objectors: Recent Developments and a New Appraisal*, 70 Colum. L. Rev. 1426 (1970). If persons whose opposition to war stems from non-religious beliefs can now be classified as conscientious objectors (C.O.'s) and avoid military service, then persons with the same beliefs who were denied C.O. status before *Welsh* ought to be given first priority with respect to pardons of amnesty. Of course, whether or not these factors can be taken into account depends on whether amnesty is granted or a pardon board is created. It would probably be administratively infeasible for an amnesty to take moral beliefs into account. See p. 126 *supra*; but cf. Congressman Koch's recent bills, notes 165 & 167 *supra* (any person in military service, in jail, or in exile could return to full civilian status and seek exemption from military service as selective conscientious objectors).

²⁸⁷ For example, many deserters currently receive dishonorable administrative discharges. See p. 109 & note 133 *supra*. Although certain stigmas do attach to such a discharge, the discharged serviceman does face a jail sentence, and therefore the administrative discharge acts as a partial pardon.

Likewise, many draft evaders are excused from prosecution or from serving sentences after conviction if they submit to induction or to alternative service. See p. 111 and note 148 *supra*. A draft evader benefitting from this treatment is, in effect receiving a conditional pardon.

In weighing the considerations for and against pardons or amnesty, Congress or the President must also keep in mind the large number of options available to them for dealing with draft evaders and deserters. The appropriateness and the political acceptability of pardons or amnesty would depend largely on their scope, the conditions attached to them, and the time when they were granted. In this regard, the most politically and administratively feasible course of action, once a decision had been made in favor of some form of pardons or amnesty, would be to grant amnesty to all draft evaders on the condition that they submit to induction into the armed services or perform two years of alternative service, and to all deserters on the condition that they complete their tours of duty, plus a period of time equal to their unauthorized absence, in combat or non-combat military service.²⁸⁸ As for the timeliness of pardons or amnesty, it would probably be most feasible politically to wait until American combat involvement in Indochina had ended.²⁸⁹

Perhaps the simplest and least controversial course of action which could be taken by Congress or the President, absent strong popular pressure for an amnesty,²⁹⁰ would be to avoid the issue altogether and to keep it out of the public eye as much as possible. This appears to be the presidential policy to date.²⁹¹ However, it is clear that serious consideration should be given immediately to the factors for and against pardons or amnesty and to the many options open to the President and Congress for dealing with deserters and draft evaders.²⁹²

E. Conclusion

The Constitution gives the President the power "to grant reprieves and pardons for offenses against the United States." This clause has been broadly interpreted by the courts to allow the President to grant full, partial or conditional pardons or amnesties for every federal offense, except in cases of impeachment.

Congress appears to have the same authority as the President, although its pardoning power is less certain because it has been exercised infrequently and tested little by the courts.

A number of options are open as to the type of amnesty or pardons which Congress or the President could grant to deserters and draft evaders. Amnesty might be granted to entire classes of offenders, or pardon boards might be created to consider cases individually. Pardons or amnesty could operate to remove any part of the punishment applicable to an offense, or they could remit the punishment altogether. Any condition can be attached to a pardon or amnesty, as long as it is lawful and possible to fulfill.

Presidents have in the past granted pardons or amnesty to deserters, draft evaders, and even persons guilty of treason. Whether or not similar pardons or amnesty will be granted in the near future depends ultimately on a political judgment, one which Congress or the President will soon have to make. At the very least, studies should be undertaken immediately to determine when and if an amnesty or a large number of pardons would be advisable and what form the amnesty or pardons should take. [D.L.R.]

²⁸⁸ See pp. 126-27 *supra*. It should be noted that conditions which may be thought desirable by the President or Congress may be unacceptable to deserters or draft evaders.

²⁸⁹ It is unlikely that many Americans would favor an amnesty while American servicemen were still dying in action in Indochina. However, it should not be necessary to wait any longer than the end of our combat involvement in Vietnam. Note that President Truman created his Amnesty Board a year after the hostilities had ended. See p. 123 *supra*. President Lincoln granted amnesty to deserters before the Civil War had even ended. See p. 122 *supra*. President Johnson's first amnesty came within two months of the end of the Civil War. See *id.*

²⁹⁰ Although much has been written on deserters and draft evaders (abroad (see note 4 *supra*), and although more and more arguments concerning amnesty have been raised (see note 158 *supra*), the problems of draft evaders and deserters do not appear to be, and may never be, so immediate to the American electorate as to result in substantial political pressure for an amnesty.

²⁹¹ See p. 88 *supra*.

²⁹² Mr. James F. O'Neill, member of President Truman's Amnesty Board, has stated that he "would be hopeful that the Government would initiate something now so that a fair evaluation might be made of the situation, to take it out of the emotional area as much as possible. If this does not happen, some great injustices will be done." *Interview*, July 27, 1971. See also Senator McGovern's campaign promise of amnesty, and various bills introduced in the House and Senate, p. 113 *supra*.

11. LUSKY, LOUIS, "AMNESTY: WHAT SORT WILL BIND OUR WOUNDS"

[Reprinted From The Washington Post, Jan. 9, 1972, p. C3]

(The author is professor of constitutional law at Columbia University Law School)

Mr. Justice Holmes once remarked that the most important thing is to get on to the next thing. From our earliest days we have done it, after every divisive conflict. From the Shays and Whisky rebellions in the 18th Century, through the Civil War, down to the Korean conflict, the ending of hostilities has always been followed by amnesty in one form or another.

President Nixon, in a Jan. 2 television interview, said—with a later qualification—that "we always, under our system, provide amnesty. You remember Abraham Lincoln in the last year—the last days, as a matter of fact—of the Civil War, just before his death, decided to give amnesty to anyone who had deserted, if he would come back and rejoin his unit and serve out his period of time." He added that he "would be very liberal with regard to amnesty."

Clearly, amnesty for Vietnam war resisters is an idea whose time has come. As the war grinds toward a halt, we must turn to the task of binding wounds, whether we be military veterans or jailed objectors, supporters of Calley or of the Berrigans. What is important now is that Americans sort out their feelings about what form amnesty should take.

Public debate has already started, and the coming months will see it proliferate. The formulation of positions began more than a year ago, when the American Civil Liberties Union recommended broad amnesty for draft violators, exiles and military offenders. Last March, Rep. Edward I Koch (D-N.Y.) introduced a bill to give relief to conscientious objectors to particular wars. Sen. George S. McGovern (D-S.D.) has declared amnesty to be part of his program in seeking his party's presidential nomination. Last month, Sen. Robert Taft Jr. (R-Ohio) proposed a broader bill, and Rep. Koch is said to be ready to introduce the Taft bill in the House, along with another that would further extend the coverage.

THE POLITICAL REALITIES

What action do we want ultimately to emerge? This, of course, does not mean "what we wished had happened." Politics does not concern itself with trying to lure back the moving finger. Many Americans wish that the Southeast Asia war had never happened. But it did, and we must deal with facts as they now are—and as they may be in the future. Objectors by the tens of thousands have broken the law in their opposition to the war. Some have avoided prosecution by self-exile, some are serving sentences, some have completed their sentences but bear the stigma of criminal status—and, as ex-convicts, may face the loss or impairment of such rights as eligibility for public employment and admission to the bar.

The primary political reality, for the time being, was noted by President Nixon: So long as Americans are fighting in Southeast Asia, and probably so long as American prisoners of war are held there, amnesty is virtually impossible. The exception might be clemency for those convicted because their cases were decided before later decisions narrowed the reach of the law. For example, draft refusers punished for conscientious but nonreligious refusal before the Supreme Court ruled in 1970 that such objection should be recognized might win amnesty now. But this is a relatively small group, and they may well be able to wipe out their criminal status through habeas corpus or some other post-conviction remedy even before amnesty is forthcoming.

Granted, however, that amnesty will not materialize until the war is virtually ended, it does not follow that significant congressional action at present is impossible or even premature. Within the foregoing restrictions, there is a considerable range of possibilities for useful legislation, and the range will widen as the end of the war is approached and accomplished.

How soon the widening will come, or how far it extends, will depend largely on the way the war ends. Should it cease at a defined moment—whether by presidential or congressional action—amnesty is likely to be broader and quicker. Should the war trail off as gradually as it began, with nobody really sure whether there is still a war, amnesty will be meager and slow.

THE ULTIMATE JUDGMENT

Still more fundamentally, the extent of amnesty will depend on the ultimate judgment of Americans on the war itself. Public opinion today still favors the ending of the war. But it is not so clear how many would go farther and say that the whole war has been wrong, and how many would say only that, right or wrong, it has been a frightful and divisive experience that we should thrust into history as soon as possible.

If it turns out that most Americans believe the war to have been basically wrong, amnesty promises to be broad. The central judgment then is likely to be that every American should be relieved of all legal disadvantage he would not have suffered if the war had never begun. That implies not only remission of criminal penalties, but erasure of criminal status for every offender whose crime would not have been committed but for the war.

There might however, be some qualifications. It would not be illogical—though it would be administratively difficult—to limit clemency to those whose offenses were motivated wholly or partly by conscientious opposition to the war. (To be sure, such a limitation would discriminate against the inarticulate ghetto dweller who, without seeking any particular religious or philosophical justification, simply repudiated the obligation to fight in a white man's war.)

Neither would it be illogical—though, again, it would be administratively difficult—to deny full clemency to those whose offenses have been "violent"—this is not an easy term to define: Does it include sit-ins? Scrambling draft board records?—and who, by such acts as arson and assault, became menaces to their neighbors. Even with these limitations, however, most acts of criminal opposition to the war would be pardoned.

If, on the other hand, it turns out that most Americans can agree only that the war should be put behind us, amnesty will be narrower. There may be liberation of prisoners, but no erasure of the stigma of conviction or restoration of political and civil rights. There may be amnesty for federal offenders (most of whom are draft refusers) but not for state law violators (most of whom have been convicted for some violence or near-violence, though the great majority have done no more than engage in illegal demonstrations).

CONGRESSIONAL ACTION

But even if the exact shape and timing of the ultimate amnesty is not now knowable, it is not too soon for congressional action. Though clemency for federal offenses is an executive function (Article II, Section 2 of the Constitution gives pardoning power to the President), the moral support of Congress may be important. Because of the divisiveness of this long war, the act of clemency will require political courage (particularly if it is relatively quick and relatively broad). The least Congress can and should do is to affirm by concurrent resolution its support for such amnesty as the President may see fit to grant.

But Congress can and should go further. In 1896, the Supreme Court declared that Congress, too, has amnesty power. On this basis, Congress could assume more of the political responsibility by enacting its own amnesty grant, effective upon the cessation of hostilities and the release of war prisoners. Any constitutional doubt could be avoided by providing that the statute be ineffective unless the President, by signing the bill or by a later public proclamation, had manifested his approval.

In addition, there are some acts of clemency that the President cannot perform without congressional authorization. He probably lacks power to restore citizenship that has been renounced as a protest against the war; Congress, possessing the power to naturalize, could restore it. Nor can the President grant amnesty to offenders against state law, such as illegal demonstrators.

AMNESTY BY THE STATES

There may be some doubt whether state offenses can constitutionally be pardoned even by joint action of Congress and the President. Possibly a constitutional amendment would be necessary. An amnesty amendment would not be unprecedented; Section 3 of the Fourteenth Amendment, adopted in 1868, authorized Congress to lift the political disabilities that the section legitimated for ex-rebels. But in my opinion a new amendment is not needed because an-

other provision of the Fourteenth gives Congress the power to pardon state law offenses in the present circumstances.

Section 1, after providing that all persons born or naturalized in the United States and subject to its jurisdiction are its citizens, goes on to provide: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The clause has been little used, largely because of a restrictive—and, I believe, erroneous—interpretation by the Supreme Court in 1873 in the Slaughterhouse Cases. But the original purpose of the clause is precisely applicable here. The purpose was to enable Congress, by defining the privileges and immunities of federal citizenship, to afford protection against hostile state action. The newly freed slaves were, of course, the main subjects of concern, but the clause is not limited to them.

If Congress believes that our national interest requires the early restoration of domestic harmony and that such harmony will be promoted by amnesty for antiwar demonstrators and others, then Congress has the power to grant them amnesty. What it takes is a declaration by statute that it is a "privilege and immunity" of United States citizens to gain annulment of convictions and other legal disadvantages suffered by reason of specified acts of opposition to the war. If Congress so provided, the amnesty could be conditioned upon presidential activation, and it could be made subject to such conditions (for example, an oath of allegiance) as Congress might stipulate or empower the President to impose.

Even in advance of federal action, state governors could grant amnesty for state offenses. A federal signal in any form, however, would provide much-needed political support and encouragement and lead the nation toward clearing the social debris of the war and turning tragedies into bygones.

12. LUSKY, LOUIS, "AMNESTY FOR WHOM, AND HOW MUCH?"

[Reprinted From The National Observer, March 11, 1972]

"Why should we forgive these traitors and cowards, pardon their crimes, welcome them back from Canada and Sweden?"

The question is asked whenever amnesty for war resisters is debated. There are myriad variations on this same theme; sometimes the bluntness is softened, sometimes the rightness or wrongness of the war is acknowledged to be relevant, sometimes distinctions are recognized between those who have fled and those who have submitted to punishment. But the core of the question is constant. It always starts with "Why" and it always is premised on the following assumptions:

(1) That those who have broken the law to show their opposition to the war in Southeast Asia are "traitors" (meaning "disloyal" rather than actually guilty of treason as defined by Article III, Section 3 of the U.S. Constitution).

(2) That those who have broken or evaded the law in order to avoid service in the war are also cowards.

(3) That the society can well do without these people if they choose to leave or stay away, and can well relegate them to the status of fugitives, convicts, or ex-convicts if they elect to return or remain.

(4) That the only real problem is how to be fair to these law violators (and their families)—the remaining 200,000,000 or so of us having nothing to worry about except the general ethical responsibility to let the punishment fit the crime.

(5) That the "we" (Why should *we* forgive) does not include the law violators, but includes only the great law-abiding majority who have made the laws and have at least acquiesced in the war.

Believing that each of these assumptions is fallacious, I shall try to show that the dominant concern for amnesty is a concern for the welfare of society as a whole, and that prepossession with the problem of fairness to the violators involves a sad distraction from the main point. Secondarily, I shall mention a few undisputed facts that, in my opinion, cast serious doubt on the accuracy of the first three of the five listed assumptions—facts that suggest that amnesty may be called for even if we disregard the needs of the larger society and seek nothing but fairness to the law violators. In addition, I shall very briefly describe the legal tools that are available to do whatever the American

people ultimately say they want done—as they may say at the polls this November.

First, let us examine the root question, the starting point for appraisal of any proposal for public action: Whose ox is being gored? The fourth and Fifth of our five propositions both say, in different ways, that fairness to the lawbreakers is our only concern. I submit that, though by no means unimportant, it should not be even our primary concern. I say that our primary concern is to thrust this long and divisive war into history as completely and rapidly as we can, to let time get on with its healing, to cleanse our society of a continuing legal fallout whose half life is measurable in decades, and—without denying ourselves the honor of mourning the dead, supporting the crippled, and comforting the bereaved—to turn our minds and hearts to the future.

LESSONS CAN BE LEARNED

Dirty and frightful as the war experience has been, lessons can be learned from it that may help us deal with future challenges in a manner more humane, more effective, and less expensive: The war has demonstrated that a society such as ours, in which the people have the ultimate power of decision (however long the exercise of that power may be delayed), will tear itself apart if led into a war whose necessity cannot be made clear to all or nearly all of the people. The war has also done much to liberate us from the fiction, so carefully nurtured by Sen. Joseph McCarthy and his latter-day disciples, that communism is a unitary, monolithic phenomenon comparable to a killing disease—leprosy, say, or tuberculosis—which we are honor bound to fight wherever we find it, and which we can effectively handle with the same sovereign remedies wherever and whenever it shows itself. The war has done a great deal to dispel the dogma that our nation (militarily encumbered, as it is, by its dependence on consent and its humanitarian ideals) can lick anyone we elect to fight, and the still more dangerous dogma that a "white" nation can lick a "nonwhite" nation in any fair and equal combat. The war has also reminded us, as we have not been reminded since the Great Depression, that our liberties are fragile—lovely flowers that flourish and blossom only in the sunlight of common consent—and that our society can remain open only if the policies of our Government command the support, or at least the acquiescence, of nearly everybody (not just a 51 per cent majority).

All these lessons, and others too, will serve us well when we grapple with the problems of today and tomorrow, if only we can allow ourselves to learn. But our ability to understand and profit from the dearly bought experience is, and will remain, gravely impaired so long as the legal debris of the Southeast Asia war remains to distract us, so long as our eyes are blinded by the ashes of dead issues.

What is this legal debris? Let us suppose that tomorrow morning the fighting ends and all war prisoners are sent home. (For years we have been told that the war's end is imminent; and it is a good bet that it will in fact end, or practically end, no later than a few weeks before the November election.) What, then, will our situation be? At that time we shall have terminated the war in its international aspect only. On the domestic side, these quite substantial vestiges will remain—and, barring amnesty, will remain for years and decades to come:

(1) Tens of thousands of objectors to the war have broken the criminal law and, if not already prosecuted, are subject to prosecution. Numerically, the largest groups are draft refusers (or evaders) and participants in illegal demonstrations. The great majority have engaged in no act that has involved or threatened injury to any person, or substantial damage to (or theft of) any property; but some few have committed assault, arson, burglary, and perhaps worse.

(2) Some of these people have exiled themselves in Canada, Sweden, and other foreign countries. Others, who have not fled, either (a) have been convicted and have completed their sentences, or (b) are presently being prosecuted, or (c) are subject to prosecution.

(3) This last group—those who are subject to prosecution but have not yet been arrested or indicted—is by far the largest. The war's end may lead most prosecutors to ignore them in favor of more dangerous offenders. Even so, however, each of them (and probably his spouse and close associates) will

know that prosecution may ensue—at any time before the applicable statute of limitations has run (and some of them run a long time)—if anything is said, published, or done that awakes the prosecutor's unfavorable attention. The violator will in effect be a probationer, and as such he will have reason to keep his mouth shut on controversial issues. His one venture in political expression—opposition to the war by illegal means—may prove to be his last.

(4) Almost without exception, these violators believe—perhaps rightly, perhaps not—that they have served rather than harmed the United States by revealing, through their lawbreaking or self-exile, the depth of their own conviction that the war has been wrong, helping to speed the general realization (which all agree has now come) that the war must be ended. Millions of others share that belief, and will continue to proclaim the injustice of continued punishment, prosecution, or *de facto* probation. To that extent—and it is a large extent—the divisive effect of the war will be prolonged.

(5) The rangle will not die away as soon as prosecutions are ended and sentences served. The stigma of criminal status—the status of the ex-convict—will still rest on those who have suffered it. The status carries with it various political and civil disabilities, heavier in some states than in others: disability to vote, to hold public office, to obtain public employment; ineligibility for admission to the professions such as law, medicine, and teaching, or for admission to other licensed callings such as taxi driving and liquor retailing; and so on.

(6) The law violators are numerous enough, and are sufficiently dispersed geographically, to spread these effects throughout the land. The problem is thus a national one, and—arising as it does from a national war, involving as it does our national political health—it can only be dealt with effectively and uniformly through Federal action.

These are the conditions that will face us when the war is over. But should we postpone until then our consideration of the problem? I do recognize the accuracy of President Nixon's prediction that amnesty—though it will surely come, as he says just as it has come (in one form or another, and not always under the name of amnesty) after every divisive rebellion or foreign war—will be delayed until our prisoners are back home and American servicemen (except perhaps for volunteers) no longer fight in Southeast Asia. It does not follow, however, that we ought to wait until then to lay the political groundwork. It is not too soon to initiate public debate on the scope and timing of the amnesty—the amnesty that history and the President say is inevitable, and which the President, on Jan. 2, declared he would be "very liberal" in granting when the time comes. There are enough months left before the November election for public opinion to crystallize, for candidates to be queried on their amnesty views, and thus for the people's will to be expressed at the polls.

Nor is it too soon to lay the legal groundwork. It is true, as President Nixon has reminded us, that clemency for Federal offenses is an executive function. Article II, Section 2 of the Constitution gives pardoning power to the President. But Congress also has a part to play.

At a minimum, Congress can and should shoulder part of the political responsibility—for amnesty, particularly if relatively quick and broad, will require political courage of a high order; this long war has been divisive—by a concurrent resolution affirming congressional approval and support of whatever amnesty it thinks the public interest demands. That is the least that Congress can do, or at any rate it is the least that I think Congress *should* do.

There is explicit, though not indisputable, authority that says Congress itself has the power to grant amnesty. The Supreme Court has so declared on more than one occasion, though always in cases that involved other issues and did not squarely present the question of congressional amnesty power. An amnesty statute would constitute an assumption of full political responsibility by Congress. It would also constitute the most authoritative expression of the will of the American people, a consideration the importance of which will be explained in a moment.

To avoid any lingering Constitutional doubt (and to avoid the wrangling of Constitutional experts that delayed enactment of the 1964 Civil Rights Act), the effectiveness of the statute might be made conditional upon affirmative Presidential action. That is to say, the bill might stipulate that it would become law only if the President signed it, or approved it by later public proclamation—not if he simply failed to sign it (which ordinarily allows a bill to become law) or vetoed it (unless it were then enacted over his veto and he or his successor later approved it by proclamation). Politically, such a limitation

is of small importance in view of the unlikelihood that the bill would pass at all without support from the White House.

It may be said that such a concurrent resolution or statute would be premature at the present time because the war is still being fought. Perhaps this is so, although the objection might be at least partially obviated by a provision delaying the effective date until the President proclaimed that hostilities had ended or been reduced to such a level as to justify the effectuation of amnesty.

But let us assume that specific amnesty action is deemed to be premature for the time being. There is still grist for the congressional mill. It is certainly not too soon to provide the President with all the authority he needs for full and effective amnesty, even though he may not exercise it for a while. Congress has followed this course before. For example, the President was vested with authority to fix prices, wages, and rents long before he saw fit to exercise it. When the time did come, he was in a position to act without delay for congressional action.

PRESIDENTIAL POWER LIMITED

True it is that the President already has plenary power to grant clemency to Federal offenders, both military and civilian. True it is that such clemency can take the form of full pardon (with erasure of guilt—as is done in cases of mistaken identity), or remission or reduction of punishment. True it is that reasonable conditions—perhaps an oath of allegiance, as after the Civil War; perhaps alternative public service, as proposed by Senator Taft and others—can be attached. There are, however, certain things that the President probably lacks power to do without congressional authorization. He probably lacks power to restore the citizenship of those who have relinquished it in protest against the war: it is Congress that possesses the naturalization power. And he surely lacks power to grant clemency to the many violators of state law, a category that includes most of the illegal demonstrators.

As a matter of fact, some Constitutional lawyers may well say that this latter group cannot be granted clemency even by Congress and the President acting in concert. They may say that the power resides only in the respective state governors. My own opinion is otherwise. I believe that Congress has an untried but available Constitutional resource in the "privileges or immunities clause" of the Fourteenth Amendment. As I have written before:

"Section 1, after providing that all persons born or naturalized in the United States and subject to its jurisdiction are its citizens, goes on to provide: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' The clause has been little used, largely because of a restrictive—and, I believe, erroneous—interpretation by the Supreme Court in 1873 in the Slaughterhouse Cases. But the original purpose of the clause is precisely applicable here. The purpose was to enable Congress, by defining the privileges and immunities of Federal citizenship, to afford protection against hostile state action. The newly freed slaves were, of course, the main subjects of concern, but the clause is not limited to them.

"If Congress believes that our national interest requires the early restoration of domestic harmony and that such harmony will be promoted by amnesty for antiwar demonstrators and others, then Congress has the power to grant them amnesty. What it takes is a declaration by statute that it is a 'privilege and immunity' of United States citizens to gain annulment of convictions and other legal disadvantages suffered by reason of specified acts of opposition to the war. If Congress so provided, the amnesty could be conditioned upon Presidential activation, and it could be made subject to such conditions (for example, an oath of allegiance) as Congress might impose or empower the President to impose."

A JUDGMENT ON THE WAR

It remains to consider how broad the amnesty should be. That depends ultimately upon whether our concern extends to the condition of our whole society, or whether we interest ourselves only in fairness to the violators; and that question is intimately linked with the judgment that the American people make upon the rightness or wrongness of the war itself. If the war is found to have been the basic mistake from which all else flowed, those who opposed it sooner and more vigorously than the rest of us are to be regarded as having performed a service through their illegal acts. They may well have sped the general realization of the war's true character; at any rate, that was their

purpose and their hope. This realization has gradually come into focus as we have read the Pentagon Papers, as we have learned the shabby factual basis of the recently repealed 1964 Gulf of Tonkin Resolution (which, in the absence of a formal congressional declaration, is generally taken to mark the beginning of the war). If the violators have served the United States by their submission to punishment or self exile—acts which, it may be said, have connoted courage much more often than cowardice—amnesty should be broad, quick, and unconditional.

A strong case can be made for the proposition that Americans did pass adverse judgment on the war no less than four years ago. In my opinion the 1968 Presidential election, in which both major candidates won nomination on an end-the-war program—and in which President Lyndon B. Johnson (who indeed had won the 1964 election on a no-war platform) declined to run for the stated reason that he feared his candidacy would hamper his peacemaking efforts—was a clear condemnation of the war. If it was, most Americans have said that the war has been a bad one at least since 1968, if not since its beginning.

This November the people will have another opportunity to express themselves, if the issue is adequately framed in the Presidential and congressional races. Should the people reaffirm what I think they said in 1968, it logically follows that every American should be relieved of every legal disadvantage he would not have suffered if the war had never begun (or, at the least, any such disadvantage that he incurred after the 1968 election). That implies not only remission of criminal penalties but erasure of criminal status, for every offender whose crime would not have been committed but for the war.

It is desirable that amnesty be granted openly and officially if premised on the wrongness of the war—not bit by bit in the form of quiet military discharges given to deserters, or case-by-case leniency accorded by clemency commissions or parole boards. The candid admission of error is beneficial not only to the individual soul, as the churchmen tell us, but also to the body politic. The French profited from their painful recognition of the wrong done to Captain Dreyfus. The Germans profited from their even more painful recognition of the wickedness of Hitler and his Nazis. We Americans, if we truly believe that the war in Southeast Asia has been a bad mistake, would benefit—both in self-esteem and in our relations with the rest of the world—by making express and official acknowledgment of the error, and doing it sooner rather than later.

Full amnesty might not, however, be thought appropriate in all cases. It would not be illogical, though administratively difficult, to limit clemency to those whose offenses were motivated wholly or partly by conscientious opposition to the war. (To be sure, such a limitation would discriminate in favor of the articulate young men who are capable of explaining their feelings in religio-philosophical lingo; and relatively few of them come from Appalachia or Harlem.) Neither would it be illogical (though, again, administratively difficult) to deny full clemency to those whose offenses have been "violent"—not an easy term to define; does it include sit-ins? the scrambling of draft board records?—and who, by such acts as arson and assault, have revealed themselves as menaces to their neighbors. Even with these limitations, however, most acts of criminal opposition to the war would be pardoned.

If, on the other hand, it turns out that most Americans can agree only that the war should be put behind us, amnesty will be narrower. There may be liberation of prisoners, but no erasure of the stigma of conviction or restoration of political and civil rights. There may be amnesty for Federal offenders (most of whom are draft refusers) but not for state law violators (most of whom have been prosecuted for some form of violence or near-violence, though the great majority have done no more than block the transport of draftees or engage in other illegal demonstrations).

DANGERS IN UNJUST ACTION

In appraising the desirability of limitations upon amnesty, however, one somber fact must not be ignored. Attica stands as a reminder of the difficulty and human waste involved in punishment of people who believe themselves to have been unjustly convicted, and the primitive crudity of the methods our penologists have thus far devised for dealing with them.

And in deciding whether clemency is due to such offenders as the Berrigans, we should ask ourselves this question: Had John Brown's body *not* lain mouldering in the grave when the Civil War ended—if, instead, he had been serving a prison term—would he have been accorded less generosity than Jefferson Davis and Robert E. Lee?

Only a crystal ball could tell us how the amnesty problem will eventually be resolved. Much may depend on *how* the war ends. Should it cease at a defined moment—perhaps with the aid of the United Nations, whose competence in this regard has suddenly increased with the admission of mainland China; perhaps as a result of President Nixon's trip to Peking; perhaps as a result of a congressional act of punctuation—amnesty is likely to be quicker. Should the war trail off as gradually as it began, amnesty may be slow in coming.

But come it will. And it is now time for every American to examine his own thoughts and opinions; to make them known to all who will listen; to call upon candidates for statements of position; and to carry his convictions with him into the voting booth on Nov. 7.

13. REPORT OF THE PRESIDENT'S AMNESTY BOARD, 1947 (OWEN J. ROBERTS, CHAIRMAN), AND PRESIDENTIAL PROCLAMATION ON AMNESTY (DEC. 23, 1947)

The President's Amnesty Board, established by Executive Order of December 23, 1946, to review convictions under the Selective Training and Service Act of 1940, as amended, and to make recommendations for Executive Clemency, has completed its task and submits this, its first and final report.

Before adopting any general policies, the Board heard representatives of interested parties and groups. It heard representatives of historic peace churches, of the Federal Council of Churches of Christ in America, leaders of the Watchtower Bible and Tract Society (whose followers are known as Jehovah's Witnesses), officials of the United States Army and Navy, and the National Headquarters of Selective Service, representatives of citizens' groups, veterans' organizations, and pacifist organizations. Some of the violators themselves, formerly inmates of penal institutions, appeared, either in person or by representatives, and were heard.

Their recommendations varied from that of a general amnesty to all violators regardless of the circumstances, to a refusal of amnesty to anyone. To grant a general amnesty would have restored full civil status to a large number of men who neither were, nor claimed to be, religious conscientious objectors.

In perhaps one-half of the cases considered, the files reflected a prior record of one or more serious criminal offenses. The Board would have failed in its duty to society and to the memory of the men who fought and died to protect it, had amnesty been recommended in these cases. Nor could the Board have justified its existence, had a policy been adopted of refusing pardon to all.

In establishing policies, therefore, we were called upon to reconcile divergencies, and to adopt a course which would, on the one hand, be humane and in accordance with the traditions of the United States, and yet, on the other hand, would uphold the spirit of the law.

Examination of a large number of cases at the outset convinced us that to do justice to each individual as well as to the Nation, it would be necessary to review each case upon its merits with the view of recommending individual pardons, and that no group should be granted amnesty as such.

Adequate review of the 15,805 cases brought to our attention would have been impossible had it not been for the cooperation of Government departments and agencies, such as the Office of the Attorney General, the Federal Bureau of Investigation, the Bureau of Prisons, the Criminal Division of the Department of Justice, the United States Probation Officers, the Administrative Office of the United States Courts, United States Attorneys throughout the country, the Armed Forces of the United States and the Headquarters of Selective Service. The records of these offices were made available, and those in charge furnished requested information.

The information derived from all sources was briefed by a corps of trained reviewers. It included such essential data as family history, school and work records, prior criminal record, if any, religious affiliations and practices, Selec-

five Service history, nature and circumstances of offenses, punishment imposed, time actually served in confinement, custodial records, probation reports, and conduct in society after release. In addition, the Board had in most instances psychiatric reports and one or more voluntary statements by the offender concerning the circumstances of the offense.

When the Board organized in January 1946, about 1200 of the 15,805 violators of Selective Service were in penal institutions. The number diminished daily. At the present time there are 626 in custody; 550 of these have been committed since the constitution of this Board. The work of the Board was directed chiefly to examining the propriety of recommending restoration of civil rights to those who have been returned to their homes.

In analyzing the cases we found that they fell into classes, but that in each class there were exceptional cases which took the offender out of the class and entitled him to special consideration. The main divisions into which the cases fell were (1) those of violation due to a wilful intent to evade service, and (2) those resulting from beliefs derived from religious training or other convictions.

At least two-thirds of the cases considered were those of wilful violation, not based on religious scruples. These varied greatly in the light of all the relevant facts disclosed in each case. It became necessary to consider not only the circumstances leading up to the offense, but the subject's background, education, and environment. In some instances what appeared a wilful violation was in fact due to ignorance, illiteracy, honest misunderstanding or carelessness not rising to the level of criminal negligence. In other cases the record showed a desire to remedy the fault by enlistment in the Armed Forces.

Many of the wilful violators were men with criminal records; men whose records included murder, rape, burglary, larceny, robbery, larceny of Government property, fraudulent enlistment, conspiracy to rob, arson, violations of the narcotics law, violations of the immigration laws, counterfeiting, desertion from the United States Armed Forces, embezzlement, breaking and entering, bigamy, drinking benzadrine to deceive medical examiners, felonious assault, violations of National Motor Vehicle Theft Act, extortion, blackmail, impersonation, insurance frauds, bribery, black market operations and other offenses of equally serious nature; men who were seeking to escape detection for crimes committed: fugitives from justice; wife deserters; and others who had ulterior motives for escaping the draft. Those who for these or similar reasons exhibited a deliberate evasion of the law, indicating no respect for the law or the civil rights to which they might have been restored, are not, in our judgment, deserving of a restoration of their civil rights, and we have not recommended them for pardon.

Among the violators, quite a number are now mental cases. We have made no attempt to deal with them, since most of them remain in mental institutions with little or no chance of recovery. Until they recover mental health their loss of civil rights imposes no undue burden.

The Board has made no recommendation respecting another class of violators. These are the men who qualify for automatic pardon pursuant to Presidential Proclamation No. 2676, dated December 24, 1945. They are the violators who, after conviction, volunteered for service in the Armed Forces prior to December 24, 1945, and received honorable discharges following one year or more of duty. Most of those who, prior to the last-mentioned date and subsequent to that date, entered the Army and received honorable discharges with less than a year of service have been recommended for pardon. These men have brought themselves within the equity of the President's Proclamation, No. 2676.

The second main class of violators consists of those who refused to comply with the law because of their religious training, or their religious, political or sociological beliefs. We have classified them, generally, as conscientious objectors. It is of interest that less than six per cent of those convicted of violating the Act asserted conscientious conviction as the basis of their action. This percentage excludes Jehovah's Witnesses, whose cases are dealt with hereafter. Although the percentage was small, these cases presented difficult problems.

The Selective Service Boards faced a very difficult task in administering the provisions concerning religious conscientious objection. Generally speaking, they construed the exemption liberally. Naturally, however, Boards in different localities differed somewhat in their application of the exemption. In recom-

mending pardons, we have been conscious of hardships resulting from the factor of error.

Many of the Selective Service Boards did not consider membership in an historic peace church as a condition to exemption of those asserting religious conscientious objection to military service. Nor have our recommendations of pardons been so strictly limited. We have recommended individuals who were members of no sect or religious group, if the subject's record and all the circumstances indicated that he was motivated by a sincere religious belief. We have found some violators who acted upon an essentially religious belief, but were unable properly to present their claims for exemption. We have recommended them for pardon.

We found that some who sought exemption as conscientious objectors were not such within the purview of the Act. These were men who asserted no religious training or belief but founded their objections on intellectual, political, or sociological convictions resulting from the individual's reasoning and personal economic or political philosophy. We have not felt justified in recommending those who thus have set themselves up as wiser and more competent than society to determine their duty to come to the defense of the Nation.

Some of those who asserted conscientious objections were found to have been moved in fact by fear, the desire to evade military service, or the wish to remain as long as possible in highly paid employment.

Under the law, a man who received a IV-E classification as a conscientious objector, instead of being inducted into the Armed Forces, was assigned to a Civilian Public Service Camp. The National Headquarters of Selective Service estimates that about 12,000 men received this classification, entered camps and performed the duties assigned them. Certain conscientious objectors refused to go to such camps on being awarded a IV-E classification, or, after arriving at the camps, refused to comply with regulations and violated the rules of the camps in various ways as a protest against what they thought unconstitutional or unfair administration of the camps. Some deserted the camps for similar reasons. We may concede their good faith. But they refused to submit to the provisions of the Selective Service Act, and were convicted for their intentional violation of the law. There was a method to test the legality of their detention in the courts. A few of them resorted to that method. Where other circumstances warranted we have recommended them for pardon. But most of them simply asserted their superiority to the law and determined to follow their own wish and defy the law. We think that this attitude should not be condoned, and we have refrained from recommending such persons for favorable consideration, unless there were extenuating circumstances.

Closely analogous to conscientious objectors, and yet not within the fair interpretation of the phrase, were a smaller, though not inconsequential number of American citizens of Japanese ancestry who were removed in the early stages of the war, under military authority, from their homes in defense coastal areas and placed in war relocation centers. Although we recognize the urgent necessities of military defense, we fully appreciate the nature of their feelings and their reactions to orders from local Selective Service Boards. Prior to their removal from their homes they had been lawabiding and loyal citizens. They deeply resented classification as undesirable. Most of them remained loyal to the United States and indicated a desire to remain in this country and to fight in its defense, provided their rights of citizenship were recognized. For these we have recommended pardons, in the belief that they will justify our confidence in their loyalty.

Some 4,300 cases were those of Jehovah's Witnesses, whose difficulties arose over their insistence that each of them should be accorded a ministerial status and consequent complete exemption from military service, or Civilian Public Service Camp duty. The organization of the sect is dissimilar to that of the ordinary denomination. It is difficult to find a standard by which to classify a member of the sect as a minister in the usual meaning of that term. It is interesting to note that no representations were made to Congress when the Selective Service Act was under consideration with respect to the ministerial status of the members of this group. Some time after the Selective Service Act became law, and after many had been accorded the conscientious objector status, the leaders of the sect asserted that all of its members were ministers. Many Selective Service Boards classified Jehovah's Witnesses as conscientious objectors, and consequently assigned them to Civilian Public Service Camps. A

few at first accepted this classification, but after the policy of claiming ministerial status had been adopted, they changed their claims and they and other members of the sect insisted upon complete exemption as ministers. The Headquarters of the Selective Service, after some consideration, ruled that those who devoted practically their entire time to "witnessing", should be classified as ministers. The Watchtower Society made lists available to Selective Service. It is claimed that these lists were incomplete. The Selective Service Boards' problem was a difficult one. We have found that the action of the Boards was not wholly consistent in attributing ministerial status to Jehovah's Witnesses, and we have endeavored to correct any discrepancy by recommending pardons to those we think should have been classified.

The sect has many classes of persons who appear to be awarded their official titles by its headquarters, such as company servants, company publishers, advertising servants, etc. In the case of almost all these persons, the member is employed full time in a gainful occupation in the secular world. He "witnesses", as it is said, by distributing leaflets, playing phonographs, calling at house, selling literature, conducting meetings, etc., in his spare time, and on Sundays and holidays. He may devote a number of hours per month to these activities, but he is no sense a "minister" as the phrase is commonly understood. We have not recommended for pardon any of these secular workers who have witnessed in their spare or non-working time. Many of them perhaps would have been granted classifications other than I-A had they applied for them. They persistently refused to accept any classification except that of IV-D, representing ministerial, and, therefore, complete exemption. Most of their offenses embraced refusal to register, refusal to submit to physical examination, and refusal to report for induction. They went to jail because of these refusals. Many, however, were awarded a IV-E classification as conscientious objectors, notwithstanding their protestation that they did not want it. These, when ordered to report to Civilian Public Service Camps, refused to do so and suffered conviction and imprisonment rather than comply. While few of these offenders had theretofore been violators of the law, we cannot condone their Selective Service offenses, nor recommend them for pardons. To do so would be to sanction an assertion by a citizen that he is above the law; that he makes his own law; and that he refused to yield his opinion to that of organized society on the question of his country's need for service.

In summary we may state that there were 15,805 Selective Service violation cases considered. In this total there were approximately 10,000 wilful violators, 4,300 Jehovah's Witnesses, 1,000 religious conscientious objectors and 500 other types. Of this total 618 were granted Presidential pardons because of a year or more service with honorable discharges from the Armed Forces. An additional approximate 900 entered the Armed Forces and may become eligible for pardon upon the completion of their service. When the Board was created there were 1,200 offenders in custody. Since that date an additional 550 have been institutionalized. At the present time there are 626 in confinement, only 76 of whom were in custody on January 6, 1947.

TABULATION

Convictions under Selective Service Act considered.....	15, 805
Wilful Violators (Non-conscientious Objectors) (approximately).....	10, 000
Jehovah's Witnesses.....	4, 300
Conscientious Objectors (approximately).....	1, 000
Other Type of Violators (approximately).....	500
Those who have received Presidential pardons under Presidential Proclamation 2676 dated December 24, 1945 (approximately).....	618
Those who entered the Armed Forces and may receive pardons (approximately).....	900
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Recommended by this Board.....	1, 518
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Total recommended for pardon and who may earn pardon through service in the Armed Forces.....	3, 041

The Board recommends that Executive clemency be extended to the 1,523 individuals whose names appear on the attached list, attested as to its correctness by the Executive Secretary of the Board, and that each person named receive a pardon for his violation of the Selective Training and Service Act of 1940, as amended.

OWEN J. ROBERTS,
Chairman.
 WILLIS SMITH.
 JAMES F. O'NEIL.

GRANTING PARDON TO CERTAIN PERSONS CONVICTED OF VIOLATING THE
 SELECTIVE TRAINING AND SERVICE ACT OF 1940 AS AMENDED

(By the President of the United States of America)

A PROCLAMATION

Whereas by Executive Order No. 9814 of December 23, 1946, there was established the President's Amnesty Board, the functions and duties of which were set out in paragraph 2 of the said Executive order as follows:

"The Board, under such regulations as it may prescribe, shall examine and consider the cases of all persons convicted of violation of the Selective Training and Service Act of 1940, as amended (50 U.S.C. App. 301 ff.), or of any rule or regulation prescribed under or pursuant to that Act, or convicted of a conspiracy to violate that Act or any rule or regulation prescribed under or pursuant thereto. In any case in which it deems it desirable to do so, the Board shall make a report to the Attorney General which shall include its findings and its recommendations as to whether Executive clemency should be granted or denied, and, in any case in which it recommends that Executive clemency be granted, its recommendations with respect to the form that such clemency should take. The Attorney General shall report the findings and recommendations of the Board to the President, with such further recommendations as he may desire to make."

and

Whereas the Board, after considering all cases coming within the scope of paragraph 2 of the said Executive order, has made a report to the Attorney General, which includes the findings of the Board and its recommendation that Executive clemency be granted in certain of such cases; and

Whereas the Attorney General has submitted such report to me with his approval of the recommendation made by the Board with respect to Executive clemency; and

Whereas upon consideration of the report and recommendation of the Board and the recommendation of the Attorney General, it appears that certain persons convicted of violating the Selective Training and Service Act of 1940 as amended ought to have restored to them the political, civil, and other rights of which they were deprived by reason of such conviction and which may not be restored to them unless they are pardoned:

Now, therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by Article II of the Constitution of the United States do hereby grant a full pardon to those persons convicted of violating the Selective Training and Service Act of 1940 as amended whose names are included in the list of names attached hereto and hereby made a part of this proclamation.

In witness whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 23rd day of December in the year of our Lord nineteen hundred and forty-seven, and of the Independence of the United States of America the one hundred and seventy-second.

By the President:

Secretary of State.

14. ROTH, JEFFREY AND ROTHMAN, MITCHELL. "THE AUTHORITY OF CONGRESS TO GRANT AMNESTY"

[Yale Legislative Services, April 14, 1972]

Congress has clear constitutional authority to enact amnesty¹ for any class of offenders against the laws of the United States. This conclusion is compelled from an analysis of the nature of the pardoning power, the legislative powers of Congress, enumerated and plenary, and the scheme of government established by the Constitution; it is confirmed by judicial precedents and historical practice.

The pardoning power is an aspect of sovereignty. In the United States, the people are sovereign and they, through the Constitution, ordain the formal institutions of government. They may assign the pardoning power to whatever officials they choose. If they grant it to the chief executive, then he exercises the pardoning power not as an inherently executive function, but as an aspect of the people's delegated sovereignty.²

¹When clemency is extended to a whole class of offenders, the terms "amnesty" or "general pardon" are usually employed; when clemency is exercised on behalf of a single individual, the term "pardon" is generally used. But there is no distinction between pardon and amnesty with respect to their legal effects on the individual: "All the benefits which can result to the claimant from both pardon and amnesty would equally have accrued to him if the term 'pardon' alone had been used in the proclamation of the President." *Knote v. U.S.*, 95 US 149 (1877), at 153; the Court was referring to President Johnson's proclamation of December 25, 1865, granting "full pardon and amnesty" (15 Stat. 711, 712). This proclamation had been issued after Congress had repealed (by Act of January 21, 1867, 14 Stat. 377, ch. 8) its original authorization of presidential amnesty (Confiscation Act, July 17, 1862, 12 Stat. 559, 592, ch. 195, sec. 13). The Senate Committee on the Judiciary challenged the President's authority to grant amnesty without congressional authorization (S. Rep. No. 229, 40th Cong., 3d Sess., 1869), basing its argument on the presumed distinctions between pardon and amnesty:

Amnesty is a larger power than pardon, operating upon the crime instead of the criminal, and effecting restoration and restitution *ab initio*, instead of merely remitting unexecuted punishment, and proceeding, like what is called a general pardon, not from the executive, be he king or President, but from the government, the sovereign power . . . (In the United States it is the Congress acting with the approval of the President, or by a two-thirds vote without it. (*Id.* at 3) (italics supplied). The Supreme Court, in *Knote*, held the President had authority to grant amnesty and gave the congressional repeal of its 1862 authorization no effect; it further rejected the Judiciary Committee's organization no effect; it further rejected the Judiciary Committee's contention that there were valid distinctions between pardon and amnesty:

Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offence of which it is in the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law. The Constitution does not use the word "amnesty;" and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one matter of philological interest than of legal importance. (95 US 149, 152).

Some commentators (notably Williston, "Does a Pardon Blot Out Guilt?", 28 *Harv. L. Rev.* 647 (1915); and Humbert, *The Pardoning Power of the President*, 1941, at 76-78) continue to maintain that while an amnesty is an act of oblivion, blotting out the very existence of the guilt, pardon is only a remission of punishment and the law continues to recognize that the pardoned individual did commit a crime, so that where character is a necessary qualification (as for giving evidence in court, naturalization as a US citizen, or admission to the bar), a pardon will not remove the individual's disqualification. The view of the Supreme Court, however, is contrary:

(Pardon) extends to every offence known to the law, and it may be exercised at any time after its commission . . . (W)hen the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights . . . (*Ex Parte Garland*, 71 US 333 (1866), at 350.)

(Pardon) blots out the offence pardoned and removes all its penal consequences. (*US v. Klein*, 80 US 128 (1871), at 147.)

(Pardon) releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. (*Knote v. U.S.*, 95 US 149 (1899), at 153).

²See 16 C.J.S. Const. Law, sec. 132; 67 C.J.S. Pardons, sec. 2; and notes 3 and 6 *infra*.

Also, *State v. Nichols*, 26 Ark. 74 (1860): "(T)he pardoning power is not naturally or necessarily an executive function . . . (The people) had the right to withhold all pardoning power from any one of the three branches; or, on the other hand, they had the right to vest the pardoning power in either the legislative or judicial branches of the State government . . . The pardoning power no more vests in the Governor, by virtue of his position, than it does in the judicial branch of the government, when the Constitution is silent." (at 77).

In fact, the nature of the pardoning power is more legislative than executive in character. The duty of the executive is to take care that the laws are faithfully executed. By contrast, pardon and amnesty dispense with the execution of the laws and with the exaction of penalties and punishment.³ The power of dispensing with the execution of the laws, as by repeal, is within the legislative authority of Congress.⁴

The historical reason for vesting the pardoning power in the chief executive is because "he stands, if any one visibly does, in the place of the monarch of other nations. . . ."⁵ But in no sense are the prerogatives of the chief executive in a republican form of government co-extensive with those of the reigning sovereign in a monarchial form of government. The king was considered sovereign—"the self-sufficient power from which all other powers flow"—while under the Constitution, the President shares in the exercise of sovereign powers with the other co-ordinate branches of the government and, ultimately, with the people.⁶ Accordingly, supposed analogies drawn between the pardoning power exercised by the British Crown at the time of the American Revolution and the pardoning power conferred on the President by the Constitution are likely to be inaccurate and, more perniciously, "unsafe."⁷

In fact, the Supreme Court has modified the early exposition of the President's pardoning power announced by Chief Justice Marshall in *US v. Wilson* (1833),⁸ where the Chief Justice alluded to the practice of the English monarch

³ *State v. Nichols*, 26 Ark. 74 (1870); "It is urged . . . that the pardoning power is peculiarly an executive function, and that any exercise of such power by the Legislative is impliedly prohibited . . . The chief duty of the executive is to see that the laws are executed . . . The power of dispensing with the law and its penalties, partakes more of a legislative than an executive character." (at 79).

⁴ See 22 C.J.S. Criminal Law, sec. 27. See also 59 Am. Jur. 2d, Pardon and Parole, sec. 20. See note 62 *infra*.

Note that a legislative repeal cannot vacate a final judgment nor arrest execution of sentence already pronounced. *Id.*

⁵ Lieber, *On Civil Liberty and Self-Government*, (3d ed., rev., 1877), at 433.

⁶ *Id.* "The monarch alone was considered the indisputable dispenser of pardon; and this again is the historical reason why we have always granted the pardoning privilege to the chief executive, because he stands, if any one visibly does, in the place of the monarch of other nations, forgetting that the monarch had the pardoning power not because he is the chief executive, but because he was considered the sovereign—the self-sufficient power from which all other powers flow; while with us the governor or the president has but a delegated power and limited sphere of action, which by no means implies that we must necessarily or naturally delegate, along with the executive power, also the pardoning authority." (at 433).

See also *State v. Nichols*, 26 Ark. 74 (1870): "our form of government . . . is not analogous or similar to any monarchial form of government, and . . . a power exercised by a monarch does not necessarily prove that such powers belong to the Executive of a State.

"In a republican form of government . . . the three branches represent the sovereignty of the State . . .

"The theory of all monarchial forms of government is, that the monarch . . . rules by 'divine right,' and that he is the depository of all supreme power . . . Under such a form of government, the power to pardon . . . is a dispensing power of the sovereign; a crime in such a country . . . is against the king.

"In a republican form of government . . . what belonged to one branch of government under a monarchial form, is lodged in three different departments . . ." (at 76) (italics supplied).

⁷ *Fleming v. Page*, 50 US (9 How.) 603 (1850): "But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belongs to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide." (at 618).

An example of the contrary conclusions that may be drawn from British practice appears in the post-Civil War debate over the President's power to grant amnesty. The Senate Judiciary Committee Report (*supra* note 1) reviewed British precedents and concluded that the English monarch did not himself issue amnesty by proclamation "after Great Britain had a constitution and a settled jurisprudence," although amnesties were frequently granted under acts of Parliament. (at 2-3). A refutation of the Committee's view was published in the same year in the *American Law Register*; according to this source, the granting of amnesty in Britain under acts of Parliament was "in no sense in derogation or denial of the king's prerogative to grant a general pardon" but, rather, the participation of Parliament constituted a "confirmation of the royal grace and favor, so as to make it more effectual and beneficial . . ." He concluded: "(T)he power to grant a general pardon or amnesty has uniformly been treated in England as being included within the royal prerogative of pardon, even when exercised under and by Acts of Parliament." L.C.K., "The Power of the President to Grant a General Pardon or Amnesty for Offences against the United States," 8 *Amer. Law Reg.* (new series) 513 and 577 (1869) at 525, 532.

⁸ *U.S. v. Wilson*, 32 US (7 Pet.) 150 (1833).

before the American Revolution and noted a special relationship between executive authority and the power to grant pardons:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate. . . .⁹

The Court, through Mr. Justice Holmes, repudiated Marshall's view in *Biddle v. Perovich* (1927):¹⁰

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. . . . (T)he public welfare, not his (the convict's) consent, determines what shall be done.¹¹

In short, the Court thus modified its earlier holding that the pardoning power is a purely personal prerogative of the chief executive, holding, instead, that the power to grant pardon is part of the constitutional scheme—this latter holding, unlike the former, carrying with it no implication that the very nature of the pardoning power precludes Congress from its exercise. In addition, the Court grounded the exercise of the pardoning power in considerations of the public welfare—the type of Considerations no less appropriate for determination by the legislature than by the executive.¹²

While the Constitution vests in the President authority to grant reprieves and pardons,¹³ it nowhere expressly prohibits Congress from exercising a similar power concurrently. The language of the constitutional provision dealing with pardons is not, in terms, an exclusive grant: it does not vest *the* pardoning power in the President, but only confers on him "power to grant reprieves and pardons. . . ." ¹⁴

That the Framers intended this grant to be exclusive cannot be ascertained from an analysis of the debates at the Constitutional Convention. Rober Sherman introduced an amendment to the provision that would have required the Senate's consent to presidential pardons. This amendment was defeated.¹⁵ The vote on the amendment decided that—with respect to a *particular* pardon—the President could exercise his authority without approval of the Senate.

⁹ *Id.* at 160.

¹⁰ *Biddle v. Perovich*, 274 US 480 (1927).

¹¹ *Id.* at 486.

¹² Courts and commentators, while conceding that the chief executive may properly be empowered to grant amnesty by the Constitution, have universally recognized that amnesty—applying to whole classes or communities and based on considerations of the general welfare—is a typically legislative function:

(Amnesty) is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. . . . Amnesty is usually general, addressed to classes or even communities, a legislative act, or under legislation, constitutional or statutory, the act of the supreme magistrate. *Burdick v. US*, 236 US 79 (1915), at 95.

The authority to grant pardon is "the power to exercise clemency in a particular case and in favor of an individual or individuals especially charged with the offense, this being an executive act of a quasi judicial kind permissible to the Governor by reason of the Constitution, while an amnesty act established a general rule abolishing the offense and applicable to all persons, or persons of a given class, whether charged or not, this being more especially an act legislative in nature. *State v. Brown*, 145 N.C. 452 (1907), at 454.

An amnesty is usually applied in cases of offenses against the sovereignty of the state, of political offenses, whereas a pardon is employed in cases of infractions of the ordinary laws of the state. . . . Recipients of an amnesty are usually members of a class or of a community, who have committed similar offenses, but the recipients of a pardon are individuals. . . . In contrast to a pardon, an amnesty displays characteristics of a legislative rather than of an executive act, in the sense that it applies to a defined class, not to a specific individual. Humbert, *The Pardoning Power of the President* (1941), at 25.

¹³ US Constit., Art. II, sec. 2: "he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

A reprieve is a temporary suspension of the imposition of punishment. After the period specified in the reprieve is concluded, the full measure of punishment, as imposed by judgment of the court, is exacted. See Humbert, *supra* note 1, at 26.

¹⁴ A similar argument is made by Weihofen, "Legislative Pardons," 27 *Calif. L. Rev.* 371 (1939), construing similar provisions of state constitutions: "There is nothing in the wording of the constitution of any state to indicate that this grant is meant to be exclusive, or that the legislature is prohibited from exercising a similar power." (at 373).

¹⁵ *The Records of the Federal Convention of 1787*, (M. Farrand, ed.), vol. 11, 419 (1937).

Whether Congress could enact amnesty, on its own authority and independently of the President, was not considered.

At a later debate, Edmund Randolph moved to exclude cases of treason from the President's pardoning power. While Gouverneur Morris thought the legislature was not fit to exercise the pardoning power in cases of treason, James Madison would have agreed to vesting that power in Congress. Rufus King believed that associating the Senate with the President in granting pardons would violate the separation of powers, and that legislative bodies by their nature were fickle and unsuited to exercise the pardoning power. Randolph's motion to remove cases of treason from the President's pardoning power was defeated.¹⁶ But again, it is quite unwarranted to conclude from isolated remarks made by Morris and King during this debate that the Convention, as a whole, meant to deny Congress authority to grant amnesty independently of the President.¹⁷ At the very least, there was never a vote of precisely this question.

In short, neither the language of the Constitution, nor the recorded debates of the Constitutional Convention, compel the conclusion that the Framers intended the constitutional grant of the pardoning power to the President to be exclusive.

The positive case for the power of Congress to amnesty or pardon specific groups of draft resisters is based on several of the granted powers listed in Article I, section 8 of the Constitution. A brief discussion of the impact of each of the relevant clauses on the problem of Congressional draft amnesty legislation follows. It will focus on the first ("provide for the common Defence and general Welfare of the United States"), fourth ("to establish a uniform Rule of Naturalization"), tenth ("To define and punish . . . Offenses against the Law of Nations"), eleventh through sixteenth (various war powers) and last (necessary and proper, or elastic) clauses, and the particular class of powers affected by each.

The first clause of Article I, section 8, will not go very far insupporting draft amnesty legislation. It has been generally accepted by both the courts and Congress that the phrase "provide for the common Defence and general Welfare" refers back to the "Power to lay and collect taxes." Congress cannot do everything it wishes in providing for the general welfare; it is limited to taxation for that purpose.¹⁸ Jefferson's writings support the idea that the clause is only a qualification of the power to tax, and not an independent granting of a new power.¹⁹ While a broader view has been argued for,²⁰ it has never been acted upon.

Congress' power in the area of naturalization and citizenship would seem to give it power to affect a small but important group of draft resisters. These are the men who have renounced their American citizenship in another country before the date of their scheduled induction. Such an action would officially make them aliens living abroad, and thus not eligible for immediate induction. This course of action was chosen by some as it means that no arrest warrant will be issued and leaves open the possibility of safe, though temporary, future return to the U.S.²¹

¹⁶ *Id.* at 626-7. Hamilton, in *The Federalist* (No. 74), advanced two reasons in support of vesting the pardoning power in the President: the sense of responsibility in the exercise of power is always strongest when that responsibility is undivided; and the strategic grant of a pardon during a rebellion might be accomplished by the President but would be hindered by the need to call Congress into session if that body's consent were required. Hamilton's argument of course, supports the notion that presidential pardons might appropriately be granted without congressional approval; it does not of necessity preclude the exercise of a similar power by Congress when that body is, in fact, in session.

¹⁷ As in reasoning by analogy to British practice (see note 7 *supra*), analyzing the "Intent of the Framers" leads itself to contradictory conclusions. The Senate Judiciary Committee Report concluded that the Framers knew the distinction between pardon and amnesty and, in granting the President only power to grant reprieves and pardons, intended to withhold from him the power to grant amnesty and to reserve that power for Congress. (S. Rep. No. 239, 40th Cong., 3d Sess. (1869), at 2-3). In reply, L.C.K. concluded that the Framers never distinguished between pardon and amnesty but rather understood the pardoning power, granted exclusively to the President, to include authority to grant amnesty, and intended to exclude Congress from any exercise of it. (L.C.K., *supra* note 7, at 578-581).

¹⁸ *US v. Butler*, 297 US 1 (1936).

¹⁹ 3 *Writings of Thomas Jefferson* 147-149 (Library ed. 1904).

²⁰ Lawson, *The General Welfare Clause* (1934).

²¹ However, most draft counselors and attorneys advised against such renunciations for two reasons. It would leave the resister a "man without a country," with grave problems if he should be forced to leave the haven country. Secondly, there would be no guarantee of return, since Congress could choose to exclude these men as undesirable aliens at any time.

Congress can grant citizenship to any alien it desires; naturalization is privilege which can be given, qualified, or withheld according to Congressional discretion. The Supreme Court recognized very early that the power of naturalization lay exclusively with Congress.²² There are many instances of collective naturalization, where groups of people are awarded U.S. citizenship, effected by either treaty or statute.²³ Presumably, an act of Congress could all those who have renounced their citizenship to return to this country immediately, with an assurance of restoration of full citizenship, as the sole limitation on this Congressional power is that citizenship may not be divested arbitrarily.²⁴

While at present the procedure leading to naturalization includes a pledge made by the alien to a) "bear arms on behalf of the United States when required by the law," or b) "perform non-combatant service in the Armed Forces of the United States when required by the law," or c) "perform work of national importance under civilian direction when required by the law,"²⁵ these provisions could be waived for all those wishing to return.

In passing it should be mentioned that, according to the statutes, fleeing or remaining outside this country in time of war or proclaimed emergency for the purpose of evading military training can lead to loss of citizenship.²⁶ However, the Supreme Court has held that prior judicial or administrative hearings are necessary, otherwise the Fifth and Sixth Amendments are violated.²⁷ Thus, this provision should not hinder the return of draft resisters presently abroad. In addition, the Supreme Court has declared unconstitutional the section ruling that loss of citizenship is effected by conviction and discharge from the armed services for desertion in time of war.²⁸

The tenth clause, giving Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," has been held to give Congress the power to prosecute violations of the laws of war, which are interpreted as a subset of the "Laws of Nations." In this connection, it seems closely related to Congress' admitted power to provide for the trial and punishment of military officers through courts-martial, which will be discussed below. However, the clause has seldom be invoked or discussed by the courts, except as a basis for the trial of war criminals of enemy nations.²⁹

The six clauses beginning with the eleventh, which concerns itself with declarations of war, collectively give Congress a great deal of power over the waging of war and all issues associated with it. The powers variously granted to Congress include the ability to raise and support armies and navies, to call out the militia and provide for its organization, and importantly for our purposes, the power to "make Rules for the Government and Regulation of the land and naval Forces." Very often this conglomeration of powers is referred to as, simply, the War Power(s). It is here that the strongest arguments for Congressional authority to amnesty draft evaders, deserters and related others can be based.

Courts have always described the war powers of Congress in a wide and sweeping way. These powers have been described as extending "to every matter and activity so related to war as substantially to affect its conduct and progress."³⁰ It embraces the nation's entire system of both internal and external regulation.³¹ In fact, courts have gone so far as to say that they "include the right to do anything that Congress thinks necessary"³², and that the powers are "broad and comprehensive," and "well-nigh limitless."³³

This language to the contrary, there do exist certain limits on Congress' exercise of the war powers. However, these outer boundaries are reached only when the individual's constitutional rights are threatened.³⁴ Even so, no such

²² *Chirac v. Chirac*, 15 US (2 Wheat.) 259 (1817).

²³ See *Boyd v. Nebraska*, 143 US 135 (1892).

²⁴ *US v. Wong Kim Ark*, 169 US 649, 703 (1898); see also *Perri v. Dulles*, (3d Cir. 1953), 206 F.2d 586.

²⁵ 8 U.S.C. 1448(a).

²⁶ 8 U.S.C. 141(a) (10).

²⁷ *Kennedy v. Mendoza-Martinez*, 372 US 144 (1963).

²⁸ *Trop v. Dulles*, 356 US 86 (1958).

²⁹ See, e.g., *In re Yamashita*, 327 US 1 (1946).

³⁰ *Hirabayashi v. US*, 320 US 81 (1943), at 93.

³¹ *Varney v. Warehime*, 147 F.2d 238 (6th Cir. 1945), cert. denied, 325 US 882, rehearing denied, 326 US 805 (1945).

³² *Ex Parte Yost*, 55 F. Supp. 768, 769 (S.D. Cal. 1944).

³³ *Henderson v. Kimmel*, 47 F. Supp. 635, 641 (D. Kan. 1942).

³⁴ *US v. Krupnick*, 51 F. Supp. 982 (D.N.J. 1943); *Kennedy v. Mendoza-Martinez*, *supra* note 27.

constitutional infirmity has been found in many actions which would be considered suspect during times of peace. Perhaps the most notable of these is the use of "concentration camps" for citizens of Japanese ancestry during World War II.³⁵

The collected war powers extend beyond the actual cessation of hostilities, and "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."³⁶ It has also been held by the Supreme Court that Congress can remedy ills which military operations have produced.³⁷ This construction of the war power, supported as it has been by the courts, gives Congress the ability to meet issues raised by draft resistance, desertion, and other crimes related to the Vietnam conflict directly. The problems of shattered careers, broken families, and a divided and spent nation that Congress attempts to correct with such legislation are arguably a direct result of the war.

The power to raise and maintain armed forces embodied in clauses twelve and thirteen has allowed Congress to set up and maintain the Selective Service System.³⁸ All questions of who shall serve in the armed forces, who shall not (exemptions) and what punishments attach to the violations of such orders (flowing from the elastic clause³⁹) rest solely with the legislative branch of the national government.⁴⁰ All such exemption questions are in the plenary and exclusive control of Congress;⁴¹ and (semantically interesting for our purposes) has been described by a federal court as a "matter of legislative grace."⁴² It is possible that, as one aspect of a Congressional amnesty, Congress could act on all violators of the draft laws, whether abroad, in prison, or "on the lam," by passing a new Selective Service law or amending the present one retroactively.⁴³ A circuit court has held that Congress has the power to make orders and regulations as may be necessary to prevent those who are legally liable to service in the military from evading their duty. The opposite side of this coin would, of course, allow Congress to "overlook" those who have so "evaded their duty."⁴⁴

Congress also has the unquestioned power to make rules for the governance of the military.⁴⁵ The power to punish military offenses is broad, having no limitation as to type of offense or the fixing of punishment.⁴⁶ State National Guard units are not excluded from the jurisdiction.⁴⁷ Over a decade ago, several Supreme Court cases eliminated certain types of offenders from the *court-martial* jurisdiction of the military: included are those who have been finally discharged from the military, as to offenses committed during their period in

³⁵ *Hirabayashi v. US*, *supra* note 30.

³⁶ *Stewart v. Kahn*, 78 US 493, 507 (1870). See also *Raymond v. Thomas*, 91 US 712, 714 5 (1875), *Hamilton v. Kentucky Distilleries*, 251 US 146, 161 (1919) and *Fleming v. Mohack Co.*, 331 US 111, 116 (1947), and *Woods v. C.W. Miller Co.*, 333 US 138, 141 (1948), for the proposition that the war power does not end with cessation of hostilities, and can cover all exigencies arising from the conflict.

³⁷ As to the question of when a war is actually over, this seems a matter of Congressional, not judicial definition. *Lewis v. Anderson*, 72 F. Supp. 119 (S.D. Cal. 1947), and *NY Life Ins. Co. v. Durham*, 166 F.2d 874 (10th Cir. 1948), *cert. denied*, 348 US 817 (1954), and *US v. Ezel Packing Co.*, 210 F.2d 596 (10th Cir. 1954), *cert. denied*, 348 US 817 (1954), stated that Congressional power to legislate under the war powers ceases only when it can be reasonably said that the national emergency has come to an end.

³⁸ *In re Yamashita*, *supra* note 29.

³⁹ The validity of conscription was first upheld by the Supreme Court in *Arver v. US*, 245 US 366 (1918).

⁴⁰ See below (text accompanying note 50) for further discussion of the elastic clause.

⁴¹ *US v. Macintosh*, 283 US 605 (1931).

⁴² *US ex rel. Goodman v. Hearn*, 153 F. 2d 186 (5th Cir. 1946), *cert. denied*, 329 US 667 (1946); *Kramer v. US*, 147 F.2d 756 (6th Cir. 1945), *cert. denied*, 324 US 878 (1945); and *US v. Seeger*, 380 US 163 (1965).

⁴³ *US v. Tetsuo Izumihara*, (D. Hawaii 1954), 120 F. Supp. 36.

⁴⁴ *US v. Pomorski*, 125 F. Supp. 68 (W.D. Mich. 1954), *aff'd*, 222 F.2d 106 (1955), *cert. denied*, 350 US 841 (1955).

⁴⁵ *Weightman v. US*, 142 F.2d 188 (1st Cir. 1944). The power inherent in conscription virtually knows no limits. There are many cases, most often brought by registrants, which have held that Congress has total control over the bodies (if not the minds) of draftees and potential draftees, e.g. *Tatum v. US*, 146 F.2d 406 (9th Cir. 1944) (unwilling registrant forced to serve) and *Kramer v. US*, *supra* note 41 (service required without regard to personal wishes, pecuniary interests, or even religious and political convictions).

⁴⁶ It was held by the Supreme Court in *Dynes v. Hoover*, 61 US (20 How.) 65 (1858), at 79, that "Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations." See also *Carter v. Woodring*, 92 F.2d 544 (1937), *cert. denied*, 302 US 752 (1937) and *Adams v. Hiatt*, 79 F. Supp. 433 (M.D. Pa. 1948).

⁴⁷ See dictum supporting this contention in *Kinsella v. US ex rel. Singleton*, 361 US 234 (1960).

⁴⁸ *Houston v. Moore*, 18 US (5 Wheat.) 1 (1820).

the military service,⁴⁸ and those serving with, employed by or accompanying the armed forces abroad, at least in peacetime.⁴⁹ Yet for those who are amenable to military jurisdiction, and who have violated military law in some way because of Vietnam, whether by deserting, going AWOL, or some lesser offense, could be amnestied or pardoned.

The final clause of Article I, section 8, often referred to as the elastic clause, giving Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," allows legislators to choose any reasonable means to effectuate the various powers discussed above. Under this clause, it is conceded that Congress can create, define and punish crimes whenever necessary to facilitate the goals of the federal government. In addition, the necessary and proper clause has been cited as giving Congress the authority to enact amnesty laws remitting penalties incurred under the national statutes.⁵⁰ Congress is thus given leeway in enacting amnesty or pardon legislation based on any of the prior clauses discussed above.

The Supreme Court has dealt with the concurrent exercise of the pardoning power. This issue was raised by a grant of immunity from prosecution enacted by Congress in 1893 for witnesses required to testify concerning violations of the Interstate Commerce Act. In *Brown v. Walker* (1896),⁵¹ the Court found that the congressional act operates "as a complete pardon for the offence to which it relates"⁵²—that is, it prevents prosecution for an alleged offense and thus prevents the imposition of any penalties that would otherwise have been exacted for violation of the law, precisely the effects of a presidential pardon granted to an individual before conviction. An Act of the type was clearly within congressional authority:

The act of Congress in question securing to witnesses immunity from prosecution is virtually an *act of general amnesty*, and belongs to a class of legislation which is not uncommon either in England . . . or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons . . ." *this power has never been held to take from Congress the power to pass acts of general amnesty*, and is ordinarily exercised only the cases of individuals after conviction . . .⁵³

In short, the Court dismissed the notion that the constitutional grant of the pardoning power to the President was exclusive and held Congress had authority to enact amnesty.⁵⁴

The Court has ruled in a second contest that the authority of the President to grant pardons is not exclusive and that Congress has concurrent authority. An Act passed by Congress in 1871 authorized the Secretary of the Treasury to remit fines and penalties provided for in laws relating to steam vessels, and to discontinue prosecutions to recover such fines, at his discretion.⁵⁵ The Act

⁴⁸ *US ex rel. Toth v. Quarles*, 350 US 11 (1955).

⁴⁹ *Reid v. Covert*, 354 US 1 (1957); *Kinsella v. US ex rel. Singleton*, 361 US 234 (1960); *McElroy v. US ex rel. Guagliardo*, 361 US 281 (1960); *Grisham v. Hagan*, 361 US 278 (1960).

⁵⁰ *The Laura*, 114 US 411 (1885), approved in *Brown v. Walker*, 161 US 591 (1896), at 601.

⁵¹ *Brown v. Walker*, *supra* note 50. The Court sustained the Act against the contention that it violated the Fifth Amendment's prohibition against self-incrimination.

⁵² *Id.* at 595.

⁵³ *Id.* at 601 (emphasis added). The Court cited *The Laura* as precedent for holding that "the power vested in the President was not exclusive in the sense that no other officer could remit forfeitures or penalties incurred for the violation of the laws of the United States." (at 601). See text and notes immediately following for an exposition of *The Laura*.

⁵⁴ A similar analysis of a legislative grant of immunity from prosecution was written by Chief Judge Cardozo in *Matter of Doyle*, 257 NY 244 (1931). The New York state legislature has passed a joint resolution granting immunity from prosecution to persons who testified before an investigative committee of the legislature. The effect of the resolution, held the court, was amnesty: "It wipes out as to the witness . . . the criminal statutes of the State with all their pains and penalties, and, like a pardon, makes him a new man." (at 258). This could be accomplished by a regular act of the legislature, signed by the Governor or passed by a two-thirds vote over his veto, but not by a joint resolution that had not been submitted for the Governor's signature. Significantly, the court equated a grant of immunity from prosecution to an amnesty and approved its passage by the legislature (following the regular procedure for enacting any ordinary) in spite of the grant of the pardoning power to the governor by the state constitution:

The grant of an immunity . . . is the assumption of a power to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the country from the performance of their duties, and the prosecuting officer from his. (all these changes may be wrought through the enactment of a statute.) (at 262) (emphasis added).

⁵⁵ Act of Feb. 28, 1871, 16 Stat. 458, ch. 100, sec. 64.

was challenged on constitutional grounds⁵⁶ as an infringement of the President's power to grant pardons: the presidential power to grant pardons includes the authority to remit fines; such power, it was claimed, is exclusive; and its exercise by any subordinate government official (as provided in the 1871 Act of Congress) constitutes an infringement on presidential power which Congress is without authority to enact.

Mr. Justice Harlan, writing for the Court in *The Laura* (1885),⁵⁷ rejected the constitutional challenge. He reiterated that the presidential pardoning power cannot be "interrupted, abridged, or limited by any legislative enactment." But the power to remit fines, although included in the presidential pardoning power, was not exclusive, and could be exercised concurrently as provided by Congress in the 1871 Act.⁵⁸

For Justice Harlan, the uninterrupted history of such acts in the United States since the adoption of the Constitution amounted to a conclusive constitutional determination of their validity. Predecessors of the 1871 Act had been adopted by the very first Congress assembled under the Constitution in 1790 and reenacted regularly without objection since then. Never during the course of this history had there been a suggestion that such acts encroached on the presidential pardoning power. For Harlan, this continued historical practice dating from the early congresses in which the Framers participated, and the acquiescence under it for a century, established an authoritative constitutional construction that validated the laws as within the scope of proper congressional legislation.⁵⁹

The significance of *The Laura* case lies primarily in the implication to be drawn from its holding: If the power to remit penalties, although included in the presidential pardoning power, is not an exclusively presidential prerogative, and if Congress can vest authority to remit penalties in subordinate executive officials without thereby infringing on the President's power to grant pardons, then it follows that Congress itself can remit penalties and discontinue prosecutions directly by enacting amnesty.⁶⁰ In short, if Congress can delegate a power to some other government official, it can surely exercise that power itself.⁶¹

⁵⁶ In an earlier case, *US v. Morris*, 23 US (10 Wheat.) 246 (1825), the Supreme Court had upheld a predecessor of the 1871 Act—The Remission Act, March 3, 1797, 1 Stat. 506, ch. 361 (1xvii), sec. 1—on statutory grounds. The Remission Act provided that any person who shall have incurred any fine, penalty or forfeiture, by force of any US law for collecting duties or registering, licensing or regulating ships employed in the coasting trade, may petition the district court and set forth the circumstances in his case,

and shall direct their transmission to the Secretary of the Treasury of the United States, who shall thereupon have power to mitigate or remit such fines . . . and to direct the prosecution . . . to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just.

The Court found no constitutional objection to the statute at all; it was clearly within the scope of congressional authority to authorize lower executive officials to remit fines and penalties. The only question was one of statutory interpretation:

The authority of the Secretary to remit, at any time *before* condemnation of the property seized, it not denied on the part of the plaintiff; and it cannot be maintained, that Congress had not the power to vest in this officer authority to remit *after* condemnation: the only inquiry would seem to be, whether this has been done by the act referred to. (at 287) (emphasis supplied).

The Court held that, under the Act, it was proper for the Secretary to remit after final judgment and sentence, up to the time that the money was actually paid over. (at 296).

⁵⁷ *The Laura*, 114 US 411 (1885).

⁵⁸ *Id.* at 414.

⁵⁹ *Id.*

⁶⁰ Jones and Raish, "American Deserters and Draft Evaders: Exile, Punishment or Amnesty?", 13 *Harc. Int'l L. J.* 88 (1972), at 120. There is little practical difference between pardon and the power to remit fines, though the latter does not "blot out" the offense. *Id.* at note 228.

See Humbert, *supra* note 1, at 50-52.

⁶¹ Similar reasoning is the unarticulated premise in the Supreme Court's decision in *US v. Padelford*, 76 US (9 Wall.) 531 (1869). Padelford was claiming benefits under one of President Lincoln's proclamations of general pardon which had been issued before Congress repealed its "authorization" of Presidential amnesties. (See note 1 *supra*) In discussing the President's authority to grant amnesty, the Court stated:

That the President had power, if not otherwise yet with the sanction of Congress, to grant a general conditional pardon, has not been seriously questioned. (at 542).

Thus, the President most likely had constitutional authority of his own to grant amnesty; but certainly his authority could not be questioned in light of the express congressional authorization to issue amnesty in the Confiscation Act of 1862. That is, Congress unquestionably had authority to delegate the granting of amnesty to the President. It follows that if Congress has authority to delegate such a power, it must have authority to grant amnesty itself.

In addition to granting immunity from prosecution to witnesses compelled to testify and vesting authority to remit fines in the Secretary of the Treasury, Congress can achieve the effects of pardon by passing other types of legislation admittedly within its authority. Thus, repeal of a statute, without a saving clause, terminates prosecutions for violations of the law that occurred before it was repealed, "based on" presumption that the repeal was intended as a legislative pardon for past acts."⁶² In addition, Congress has authority to "abate prosecutions by means of legislation subsequent to performance of unlawful acts."⁶³ In fact, one commentator, while denying Congress had authority to grant amnesty, was forced to admit that Congress had authority to grant amnesty was forced to admit that Congress could achieve the effects of amnesty by passing acts concededly within its authority but not termed "amnesty":

It cannot be questioned that all the effect of amnesty may legitimately result from other acts than the President's proclamation of a general pardon, as, for example, an amnesty may result from the provisions of a treaty of peace, or from the operation of the Statute of Limitations, or from repeal of laws defining the offence and prescribing its punishment. But this result from the exercise of unquestioned constitutional powers cannot be considered as interfering with or derogating from the exclusive pardoning power which is vested in the President by the Constitution.⁶⁴

It is somewhat incongruous to recognize the admitted scope of congressional authority to achieve the effects of amnesty through ordinary legislation while, at the same time to maintain that the pardoning power is vested in the President "exclusively."

The main reason for reading the constitutional provision as an exclusive grant of power to the President is the separation of powers doctrine. This was the rationale for the decision of the Supreme Court in *US v. Klein* (1871).⁶⁵ In 1964, one V. F. Wilson took the oath of allegiance prescribed in President Lincoln's proclamation of 1863⁶⁶ and was entitled thereby to the benefits of the President's pardon. Previously, his property had been seized by the United States under the Confiscation Act of 1862.⁶⁷ However, under the Abandoned and Captured Property Act of 1863, the owner of property seized and sold by the United States might present his claim to it in the Court of Claims, and upon proving his ownership, his right to the proceeds of the sale, and that he never gave aid or comfort to the rebellion, he might obtain an order from the Court of Claims that the proceeds be paid over to him.⁶⁸

In 1865, Wilson's administrator filed a petition in the Court of Claims for the proceeds of Wilson's property. The Court of Claims held for Klein (Wilson's administrator) and the United States appealed. But by the time the case reached the Supreme Court for review, Congress had enacted an act (1870) stipulating that no pardon or amnesty granted by the President should be admitted in the Court of Claims as evidence in a claim against the United States; that the proof of allegiance required by the Abandoned and Captured Property Act of 1863 shall be made irrespective of the effect of any presidential proclamation; and that were a presidential pardon recites that the claimant did take part in the rebellion, it should be conclusive proof of the fact that he did not bear allegiance to the United States and would defeat his claim.⁶⁹

⁶² 22 C.J.S. Criminal Law, sec. 27 (b) (4). See also Humbert, *supra* note 1, at 44: "the congressional procedure in granting an amnesty would not differ greatly from the procedure in repealing a law. The grant of an amnesty by Congress might be viewed as action arising from a conclusion that a certain criminal law, after a period of trial, was inexpedient."

⁶³ Jones and Raish, *supra* note 60, at 119, note 221; see *Hamm v. Rock Hill*, 379 US 306 (1964).

⁶⁴ L.C.K., *supra* note 7, at 588.

⁶⁵ *US v. Klein*, 80 US (13 Wall.) 128 (1871).

⁶⁶ Presidential Proclamation, Dec. 8, 1863, 13 Stat. 737.

⁶⁷ Act of July 17, 1862, 12 Stat. 589, ch. 195.

⁶⁸ Act of March 12, 1863, 12 Stat. 820, ch. 120.

⁶⁹ Act of July 12, 1870, 16 Stat. 235, ch. 251. This Act was the congressional response to the Supreme Court's decision in *US v. Padelford*, 76 US (9 Wall.) 531 (1969)—see note 28 *supra*. In 1865, one Padelford took the oath prescribed in the presidential proclamation of Dec. 8, 1863. Thereafter, his property at Savannah, Georgia was seized by the United States. In March 1866, Padelford filed for the proceeds of his property under the Abandoned and Captured Property Act of 1863.

The Supreme Court affirmed the finding of fact that Padelford's actions during the Civil War did constitute giving aid and comfort to the rebellion. However, the Court held that this did not exclude him from recovery of the proceeds of his property under the 1863 Act. The general pardon to which he had subscribed purged him of all offenses against the United States and any penalty he might otherwise have incurred; had his property been seized before he took his oath, the government would have been obligated to return it; his property having been seized after he took the oath, at a time when his rights to it were unimpaired, the government had no right to retain it. (at 543).

The Court held the Act of 1870 unconstitutional as an infringement of the President's power to grant pardons.⁷⁰ The Act would impair the effect of a presidential pardon by requiring the courts to accept the pardon as conclusive evidence of the acts pardoned while, at the same time, denying the pardon any weight as evidence of the rights intended to be conferred by it. The presidential pardon intended restoration of property; therefore Congress was without authority to deny it. The Court's argument was based on the separation of powers doctrine:

It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. . . . (T)he legislature cannot change the effect of such a pardon any more than the executive can change a law.⁷¹

To read the Court's opinion in *Klein* as denying Congress concurrent power to grant amnesty is to apply the holding beyond the fact of the case. *Klein* dealt with an attempt on the part of Congress to legislate restrictions into a presidential pardon. The Court held that Congress was without authority to restrict in any way the effect of a presidential pardon; such a restriction would amount to an infringement on the executive's independent constitutional authority. The President alone has authority to determine the effects of his pardons.⁷²

The Court in *Klein*, however, did not rule that Congress could not, on its own authority, issue a congressional amnesty as it saw fit. Such an independent action by Congress, not restricting in any way a pardon granted by the President, would not infringe on this constitutional authority nor violate the separation of powers.⁷³

In short, the Court ruled only that Congress may not *limit* the effect of a presidential pardon: it may not exclude from its operation any class of offenders he chooses to include, nor deny to anyone he includes any of the benefits conferred by the President's pardon.⁷⁴ But if the President declines entirely to grant pardon to any class of offenders, Congress may enact its own general pardon to cover this class on whatever terms it considers proper.⁷⁵ Similarly, should the President grant Pardon to a limited class, Congress may expand the class to which it applies; or if the President grants pardon on conditions,

⁷⁰ *US v. Klein*, 80 US (13 Wall.) 128 (1871), at 144-147.

There was a second ground for ruling the Act invalid: Congress had invaded judicial power by prescribing a rule requiring the courts to dismiss when the decision, according to settled principles of law, would be adverse to the government. *Id.*

⁷¹ *Id.* at 147-148.

⁷² This holding simply reaffirms the Court's earlier decision in *Ex Parte Garland*, 71 US 333 (1866). Congress passed an act in 1865 (Act of Jan. 24, 1865, 12 Stat. 502) excluding as attorneys practicing in the federal courts any person who could not subscribe to an oath stating that he had not encouraged the rebellion. Garland had been admitted to the bar of the United States Supreme Court in 1860. In 1861, the State of Arkansas, where he resided, seceded from the Union. Garland served as one of the state's representatives in the Confederate Congress. In 1865, he availed himself of the full pardon granted by the President by taking the oath prescribed in the presidential proclamation of May 29, 1865.

The question before the Supreme Court was whether Garland could be prevented from practicing in the federal courts, notwithstanding his full presidential pardon, by operation of the 1865 Act of Congress prescribing an oath which he could not take. The Court held that Congress was without authority to restrict the operation of a presidential pardon in any way:

This power of the President is not subject to legislative control. Congress can neither *limit* the effect of his pardon, nor *exclude* from its exercise any class of offenders. (at 380) (emphasis added).

The Court determined that the presidential pardon relieved Garland of any punishment attached to his participation in the rebellion. Congress could not directly exclude him on that account from any previously acquired right (including, of course, the right to practice his profession), nor could it do so indirectly by requiring an oath to which he could not subscribe: "It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency." (at 381).

⁷³ This conclusion is consistent with the Court's later decision in *Brown v. Walker*, 161 US 591 (1896), holding that "(a)lthough the Constitution vests in the President 'power to grant reprieves and pardons . . .,' this power has never been held to take from Congress the power to pass acts of general amnesty . . ." (at 601). See text and notes 52-54 *supra*, and note 78 *infra*.

⁷⁴ "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders." *Ex Parte Garland*, 71 US 333 (1866), at 380.

⁷⁵ "(The courts) have never said that if a President deliberates and decides against an amnesty, Congress may not enact one itself. It seems clear that both the President and Congress have certain pardoning powers: within the scope of their respective powers, each could expand an amnesty granted by the other if it was deemed insufficient, but neither could limit the effects of the other's amnesty." Jones and Raish, *supra* note 60, at 120.

Congress may lessen or remove these conditions. Such congressional actions would not limit or restrict the presidential pardon but would expand its coverage and make it less burdensome.⁷⁶ In this manner, Congress could exercise its concurrent "power to pass acts of general amnesty" (*Brown v. Walker*, 161 US 591, 1896, at 601) without infringing on the President's pardoning power⁷⁷ and without violating the separation of powers.⁷⁸

⁷⁶ Humbert's discussion of this problem is inconclusive. The President's pardoning power would not be infringed by a grant of congressional amnesty because "the President might, for any offense or purpose, extend clemency before an amnesty had been granted by Congress. Even after Congress had provided an amnesty, the President might grant for the same offense clemency which in his judgment was required but was not being enjoyed under the congressional amnesty . . . During times in which both the President and Congress held strong convictions with respect to a group of offenders, there would be possibilities of conflict. A possibility of conflict with the President would likewise appear if Congress should grant an amnesty after the President had decided in the circumstances not to grant amnesty . . . If the President should grant an amnesty from which he excepted no offenders while Congress provided one excepting a number of offenders, an excepted offender might claim before the Supreme Court the benefits of the presidential amnesty. . . . (T)he question would doubtless present difficulties of a serious character." Humbert, *supra* note 1, at 44-45.

Humbert has apparently confused constitutional issues with political problems. In constitutional terms, it is clear that both the President and Congress may grant amnesty to any class of offenders: the President might issue a proclamation on his own authority, while Congress would enact an amnesty statute which would become law with the President's signature, or by two-thirds vote of both houses overriding his veto. If they disagree as to a particular class of offenders, the conflict between them would be political, but either would have constitutional authority to grant amnesty to that class independently of the other (the President by proclamation, Congress by two-thirds vote overriding a presidential veto). The individual would certainly have the right to claim the benefits of that amnesty (whether congressional or presidential) most beneficial to him, and the Supreme Court would no doubt uphold his claim, since both Congress and the President had independent authority to grant it.

⁷⁷ Although an independent grant of amnesty by Congress on its own constitutional authority would not infringe on the President's pardoning power, it might be argued that it would impair other presidential powers. For example, the President might contend that a congressional amnesty for those who have violated the conscription laws by reasons of their opposition to the war in Vietnam would impair his powers as Commander-in-Chief and in the field of foreign affairs.

While such considerations raise difficult questions of policy, they present no difficulties from a constitutional point of view. Presidential power is derived either from the Constitution or from acts of Congress. (See Justice Jackson's concurring opinion in *The Steel Seizure Cases*, 343 US 579 (1952)). In the "zone of twilight in which he and the Congress may have concurrent authority," if Congress has been silent on an issue, or if the express or implied will of Congress is inconsistent with actions taken by the President, then the President's power in that field is at its "lowest ebb." He must rely on his own independent constitutional authority whenever Congress withholds its express authorization from his actions. In a practical sense, of course, his "power" in that field has been "impaired" by congressional action or inaction; in a constitutional sense, there has been no impairment—the President can act to the full extent of his independent constitutional authority, but no further.

Thus, the President is empowered to "take care that the laws be faithfully executed." Conceivably, the President may deem any particular means necessary to accomplish the faithful execution of the laws. But the President is confined to employing only those means granted by Congress through law, or those derived from his inherent constitutional authority. Whether Congress grants the President any particular set of means depends on the independent policy determination of that body; obviously, where its grant is liberal, the President's power in a particular field is enhanced; but where its grant is less than liberal, the President's independent constitutional authority is in no way impaired.

Similarly, in the exercise of his authority as Commander-in-Chief and in the field of foreign affairs, the President is limited to those powers granted by congressional enactments or derived from constitutional provisions, although, as a matter of policy, he may believe other powers are essential. Congress has complete constitutional authority to grant amnesty to those who have violated the law by reason of their opposition to the war in Vietnam. No doubt, in deciding as a matter of policy whether it will consider the effect of its grant on the exercise of other presidential powers. But there can be no objection, from a constitutional point of view, to a congressional amnesty; should one be enacted, it will, in no constitutional sense, impair any presidential power, since the President will still be capable of acting to the full extent of his constitutional authority. To hold otherwise is to maintain that any independent exercise of congressional authority, contrary to the wishes of the President, amounts to an unconstitutional impairment of the President's powers and is, as a result, invalid. Such a contention is manifestly untenable.

⁷⁸ The Supreme Court has similarly held that courts, exercising judicial powers analogous to the President's pardoning power, do not unconstitutionally infringe on his powers. A court may cut short a sentence during the term in which it was originally imposed, even if the convict has begun servicing his sentence. The Court held this was a judicial function and did not infringe on the executive power to grant pardons: "To cut short a sentence by an act of clemency is an exercise of executive power which abridges enforcement of the judgment, but it does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance." (*US v. Benz*, 282 US 304 (1931), at 311) (*italics supplied*). Thus, each branch of government, in the exercise of its own independent functions, may achieve effects similar to those the other branches are capable of achieving, but without violating the separation of powers, or infringing in any way on the other's constitutional authority.

Finally, as the congressional power to grant amnesty is concurrent and co-extensive with the President's, and the pardoning power "may be exercised at any time after its (the offense's) commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment,"⁷⁹ Congress may extend amnesty to any class of offenders either before or after conviction.⁸⁰

In sum, there is no indication, either in the language of the Constitution or in the judicial exposition of government under the Constitution, that Congress is precluded from granting amnesty. On the contrary, there is judicial recognition that an act of amnesty is legislative in character, and that Congress, by enacting types of legislation admittedly within the scope of its constitutional authority, can achieve the effects of amnesty. The Court has ruled only that Congress may not restrict or limit the operation of a presidential pardon; in supplementing a presidential amnesty, or in enacting amnesty on its own authority, Congress would not violate the separation of powers. In short, Congress had plenary power under the Constitution to grant amnesty to any class of offenders, on such terms as it considers just. Furthermore, we have seen that Congress is given the constitutional authority to act on several different groups of war resisters by the granted powers enumerated in Article I, section 8. Although the general welfare clause will probably be of little assistance, the fourth, dealing with naturalization powers, will allow Congress to touch those who have renounced their American citizenship. The clauses concerning the powers of Congress are probably the most important in this area. They allow Congress to alleviate problems arising directly from the war; all categories of resisters can be included here. The admitted power of conscription implied by clauses twelve and thirteen, when coupled with the power to define and punish crimes in the elastic clause, gives Congress the ability to act on those who have violated the Selective Service Act directly. Military violators, as well as civilians attached to the military, fall under Congressional aegis as a result of the clause pertaining to government of the armed forces. In conclusion, once the overall power to amnesty is established, Congress will have the constitutional means to affect any and all groups it wished to.

15. SELECTIVE SERVICE SYSTEM LOCAL BOARD MEMORANDUM No. 107 (CRITERIA FOR CO CLASSIFICATION)

Subject: Criteria for classification of conscientious objectors

INTRODUCTION

1. This memorandum discusses certain criteria, based on the provisions of Section 6(j) of the Military Selective Service Act of 1967, as amended, and decisions of the courts, which should guide local boards and appeal boards in considering registrants' claims for conscientious objector classification.

2. Compulsory military service legislation in the United States has always recognized conscientious objection. The law as it exists today in statutory form requires for classification in Classes I-O or I-A-O:

- (a) That a registrant be opposed to participation in war in any form;
- (b) That his objection be founded on religious training and belief; and
- (c) That his position be something other than "essentially political, sociological, or philosophical views, or a merely personal moral code".

WAR IN ANY FORM

3. The clause "war in any form" should be interpreted in the following manner:

- (a) A registrant who desires to choose the war in which he will participate is not a conscientious objector under the law. His objection must be to all wars rather than to a specific war.

⁷⁹ *Ex Parte Garland*, 71 USS 333 (1866), at 380.

⁸⁰ See Humbert, *supra* note 1, at 45: "Another question which the Courts may be called upon to consider is whether or not Congress may grant amnesties after conviction. There would appear to be no convincing reason why Congress may not grant such amnesties. Since Congress may award amnesties prior to conviction and the Secretary of the Treasury may remit fines and forfeitures under congressional authorization, the argument can no longer be advanced that the pardoning power is vested exclusively in the executive."

A congressional grant of amnesty would no more infringe on judicial power, when granted after judgment than would a similar grant by the President.

(b) A belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in "war" within the meaning of the selective service law.

RELIGIOUS TRAINING AND BELIEF

4. The primary test that must be used is the test of sincerity with which the belief is held. The board should be convinced by information presented to it that the registrant's personal history reveals views and actions strong enough to demonstrate that expediency is not the basis of his claim.

5. The belief upon which conscientious objection is based must be the primary controlling force in the man's life.

6. The term "religious training and belief" as used in the law may include solely moral or ethical beliefs, even though the registrant himself may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious".

7. The registrant need not believe in a traditional "God" or a "Supreme Being" to be considered favorably.

8. The registrant's conscientious objection to war must stem from his moral, ethical, or religious beliefs about what is right and should be done and what is wrong and should be shunned, and he must hold these beliefs with the strength of traditional religious conviction.

9. In order for the local board to find that a registrant's moral and ethical beliefs are against participation in war in any form and are held with the strength of traditional religious conviction, the local board should consider the nature and history of the process by which he acquired such beliefs. The registrant must demonstrate that his ethical or moral convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated. The registrant must show that these moral and ethical convictions, once acquired, have directed his life in the way traditional religious convictions of equal strength, depth, and duration have directed the lives of those whose beliefs are clearly founded in traditional religious conviction.

10. Board members should make every effort to weigh the claims of all registrants on the standard of sincerity, not giving particular advantage to a registrant who is learned or glib. The registrant need not use formal or traditional language.

11. A registrant who is eligible for conscientious objection on the basis of moral, ethical, or religious beliefs is not excluded from the exemption simply because those beliefs may influence his views concerning the nation's domestic or foreign policies.

12. The law does not require that a registrant claiming conscientious objection be a member of a "peace church" or any church, religious organization, or religious sect, nor does the law require affiliation with any particular group in order to be classified as a conscientious objector.

13. Where the registrant is or has been a member of a church, religious organization, or religious sect and where the claim of conscientious objection is related to such membership, the board may properly inquire as to the fact of membership, and the teachings of the church, religious organization or religious sect, as well as the registrant's religious activity. However, the fact that the registrant may disagree with or not subscribe to some of the tenets of his church does not necessarily discredit his claim.

14. Boards may not give precedence to one religion over another. All religions or beliefs are to be given equal consideration.

15. Beliefs which are real and valid to some may be incomprehensible to others. Boards are not free to reject beliefs because they consider them "incomprehensible". Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they govern his actions both in word and deed.

EXCLUSIONS FROM CLASSES I-O AND I-A-O

16. Persons whose beliefs are "essentially political, sociological, or philosophical views, or a merely personal moral code" are ineligible to be classified as a conscientious objector. Such persons consist of two groups:

(a) Those with beliefs of religious, moral, or ethical nature, but whose beliefs are not deeply held, and

(b) Those whose objection to war does not rest at all upon moral, ethical, or religious principles, but instead rests solely upon consideration of policy, pragmatism or expediency.

CLASS I-A-O

17. A registrant claiming Class I-O, who in the opinion of the local board has not provided sufficient evidence to warrant the I-O classification, shall not be classified in Class I-A-O as a compromise.

18. A registrant who is found to be eligible for classification as a conscientious objector should be placed in Class I-A-O when his conscientious objection encompasses only combatant training and service in the armed forces.

CURTIS W. TARR.

16. SILARD, BELA, "INVALID CONSCIENTIOUS OBJECTOR CLASSIFICATION CRITERIA OF LOCAL BOARD MEMORANDUM 107: THE ASSERTED TRAINING REQUIREMENT"

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I. INTRODUCTION*

These comments analyze some of the conscientious objector classification criteria which the Selective Service System has promulgated in Local Board Memorandum LBM No. 107, issued shortly after the Supreme Court decided *Welsh v. United States*¹ Paragraphs 1, 4, and 9 of LBM 107 are the subject of these *Comments*. They read.

1. The memorandum discusses certain criteria, based on the provisions of Section 6(j) of the Military Selective Service Act of 1967, as amended, and decisions of the courts, which should guide local boards and appeal boards in considering registrants' claims for conscientious objector classification.

4. The primary test that must be used is the test of sincerity with which the belief is held. The board should be convinced by information presented to it that the registrant's personal history reveals views and actions strong enough to demonstrate that expediency is not the basis of his claim.

9. In order for a local board to find that a registrant's moral and ethical beliefs are against participation in war in any form and are held with the strength of traditional religious conviction, the local board should consider the nature and history of the process by which he acquired such beliefs. The registrant must demonstrate that his ethical or moral convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated. The registrant must show that these moral and ethical convictions, once acquired, have directed his life in the way traditional religious convictions of equal strength, depth, and duration have directed the lives of those whose beliefs are clearly founded in traditional religious conviction.²

The Selective Service System has here adumbrated principles of "parallelism" for moral-ethical objectors, requiring rigorous training comparable to that of traditional religionists, as well as satisfactory conduct before and after

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¹ 398 U.S. 333, 3 SSLR 3001 (1970).

The Director identified the criteria used in LBM 107 as his response to *Welsh*, which he termed a "difficult decision for the System" and "quite contrary to what the will of Congress was." News conference on June 16, 1970, reported in *The New York Times* on June 17, 1970, at 1.13; see also *Hearings on the Administration and Operation of the Draft Law*, by the Special Subcommittee on the Draft of the House Committee on Armed Services, H.R. Rep. No. 91-80 91st Cong. 2d Sess. (1970) (hereinafter 1970 *House Hearings*), at 12480, 12611-12613.

The director appears to be satisfied with the effect of his new criteria upon decisions of the boards. National Headquarters official say that the *Welsh* decision "did not result in a run of registrants claiming conscientious objection for moral and ethical reasons" and that the use of LBM 107, Guidelines For Conscientious Objection, issued shortly after the Supreme Court decision was a "great help in deciding CO claims." *Selective Service News*, February, 1971, at 3.

² For the full text of the LBM, see SSLR 200:16.

making the claim, and a showing that the belief is held with the strength of traditional religion and is the controlling force in the CO's life. These *Comments* focus on the requirement of training, to show that the parallelism criteria of the LBM conflict with clearly discernible legislative intent, misinterpret the law as construed by the courts, and belie the fact that moral-ethical beliefs do not develop by "training" similar to that by which traditional religious beliefs are acquired.

The impact of the new criteria appears to have been delayed. Most publications of the agencies to which COs and their lay counsellors have traditionally looked for guidance, and some commentators, initially focused only on those parts of LBM 107 (paras. 3, 6-8, and 10-18) which may be considered valid interpretations of *Welsh v. United States*³ with respect to the nature of a qualifying belief; but they did not challenge the criteria argued here to be invalid.⁴ Counsellors and attorneys report that local board statements began to refer to LBM 107 late in 1970. Several State Directors have given the boards instructions which specifically refer to LBM 107, quote its rules verbatim, or slightly paraphrase it.⁵ Some controversies between registrants and their boards involving these criteria are already in the appeal stage.

The following statements appear in the files of New York City and New York State registrants:

[R]egistrant's file and oral statements fail to reveal views and actions strong enough to demonstrate sufficient sincerity to support his claim for a conscientious objector. LBM 107 paragraph 4. Registrant failed to adequately demonstrate the depth of sincerity which would convince the board

³ See n. 1, *supra*.

⁴ Cf. Arlo Tatum and Joseph S. Tuchinsky, *Guide to the Draft*, 3d ed., August, 1970, at 179-181, 183-184; CCCO *Handbook for Conscientious Objectors*, 11th ed. Sept., 1970, at 43; CCCO *News Notes*, 3rd Issue, August, 1970, at 1-2; interview with Edward L. Ericson in *The Washington Post*, July 4, 1970, at A2; NIBSCO, *The Reporter for Conscience' Sake*, July 1970, at 3; SSLR *Newsletter*, 3 SSLR 11; Dale H. Drews, *Humanist Conscientious Objection, A Guide for Men of Draft Age*, addenda sheet to pages 11 and 29, December, 1970; *Conscientious Objectors: Recent Developments and a New Appraisal*, 70 Col. L. Rev. 1426, 1434. But see interview with Edward L. Ericson in AEU Reports, February, 1971, at 2; CCCO *Draft Counselor's Newsletter*, June/July 1970, at 2. More recently, such commentators have criticized the institutional bias of the system exemplified by misconception and misrepresentation of the law on the CO exemption. Cf. statement of A. Neier, Executive Director of the ACLU, Hearings on the draft Before the Armed Services Committee, U.S. Senate, 92d Cong., 1st Sess. 416 (1971) (hereinafter 1971 Senate Hearings).

⁵ Indiana boards are reported to follow their State Director's instructions that they base their stated reason for lack of sincerity on the rule that "[T]he CO's opposition must stem from a * * * commitment which is the primary controlling force of his life." Indiana State Director's letter of October 27, 1970, to all local boards, Midwest Supplement to CCCO, *Draft Counselor's Newsletter* for December, 1970, at 2.

A mimeographed multiple-choice check list found in files of Illinois registrants lists a choice of six bases for a finding of insincerity. Among these, Marked A-F, is "C. absence of evidence of religious training—[place for check mark]." Midwest Supplement to CCCO, *Draft Counselor's Newsletter* for March, 1971, at 2.

A memorandum of the Ohio State Director to all local and appeal boards lists among bases, numbered (1) thru (9), for finding of "lack of sincerity" "(8) The registrant claims religious training, yet the file is lacking in evidence of training in his home, church, or otherwise." Memorandum dated Feb. 8, 1971. Midwest Supplement to CCCO, *Draft Counselor's Newsletter* for March, 1971, at 1. This rule by no means refers only to those who specifically claim to have had religious training. Every registrant, without exception, must and does claim religious training when he executes SSS Form 150. Special Form for Conscientious Objector. In Series 1 he must sign the "Claim for Exemption" which reads in part "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form * * *." Thus, the Ohio State Director makes his rule No. 8 generally applicable and thereby instructs the boards to deny CO status on the grounds of lack of sincerity to every registrant in whose file there is no evidence of training in home, church or otherwise.

The New York State Director's March 18, 1971, letter to "all local board chairmen, members, government appeal agents, executive secretaries, field officers and field representatives" provides a "check list" for item 4, "sincerity," numbered (a) through (i), which includes the following questions:

(f) Superficial knowledge of religious beliefs, not seriously studied his religion, not as active in religious activities as time would permit?

(h) Conduct and activity inconsistent with church teaching and membership?

The item 5, "Deeply held belief," numbered (a) through (f) includes the following questions:

(b) (1) Is the belief the primary force in the man's life? LBM 107

(d) Do his professed beliefs govern his actions both in word and deed? LBM 107

(c) Does registrant hold his beliefs with the strength of traditional religious conviction? LBM 107

(d) Has registrant demonstrated that his convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated? LBM 107

that expediency was not the basis for his claim, and pursuant to paragraph 5, he further failed to convince the board that his religion was the primary controlling force in his life.^{5a}

His belief is not sincere because it is not the primary controlling force in his life.^{5b}

[A]lthough registrant claims 1-O status on religious beliefs, he has not attended church within the past 2-3 years.^{5c}

[R]egistrant is not a genuine CO; . . . his purported beliefs in opposition to war have in demonstrable way directed his life.^{5d}

He [who has been] a Zen Buddhist for three years [denied conscientious objector status because for twenty years he was not one and this was not regarded (by the board) as sufficient recent training or lack of it.^{5e}

However, no judicial decision specifically directed to the validity of these LBM 107 rules is available as yet.

Under these circumstances the views developed here should be understood to serve two main purposes: First, to bring about a clear understanding on the part of moral-ethical objectors and their counselors of the serious problems which they face under these requirements, and second, to develop legal arguments of potential assistance in administrative appeals and litigation. Because of the uncertainty of success in an area so far entirely uncharted, COs should certainly not assume that the arguments put forward here would in fact assure them acquittal in a prosecution for refusal of induction.

II. THE WEAKNESS OF THE ANALYTICAL AND EMPIRICAL BASIS FOR A TRAINING REQUIREMENT

A. Training as a statutory requirement

LBM 107 was expressly issued in response to the broad construction of "religious training and belief" established by the Supreme Court in its *Seeger*⁶ and *Welsh*⁷ decisions. Section 6(j) of the Act provides exemption from military service for any person

who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.⁸

Seeger established that a non-traditional religious claimant may qualify if his beliefs occupy in his life a place parallel to that occupied in the life of a traditional claimant by the latter's belief.⁹ In *Welsh* eligibility was extended also to the moral-ethical objector who manifests sufficient "depth of conviction". The latter phrase is thus a clarification of the *Seeger* parallelism test,¹⁰ or, in other words, a redefinition of "religiousness." These decisions made it far more difficult to deny a CO claim on the ground that "religious training and belief" was lacking; invalidated membership in traditional churches (especially "peace sects") as a handy rule of thumb for classification; and precipitated and exaggerated fear of administrative breakdown.¹¹ One response was the issuance of LBM 107.

The System had at this point to choose between several options. If all inquiry into the source, quality or strength of an applicant's beliefs were foreclosed, the local board would have to determine only whether the registrant actually (truly, sincerely) held beliefs in opposition to war in any form. However, the intangibility of this question makes it awkward to administer. Thus,

^{5a} Communication from counsel.

^{5b} Communication from registrant.

^{5c} Communication from counsel.

^{5d} Communication from registrant.

^{5e} Communication from counsel.

⁶ 380 U.S. 163 (1965).

⁷ 398 U.S. 333, 3 SSLR 3001 (1970).

⁸ 50 U.S.C. App. §465(j) (1967).

⁹ Most commentators consider *United States v. Seeger* to be the original source of the principle of "parallelism." However, the following language appears in an earlier decision:

[T]he only inquiry in such a case is the objective one of whether or not the belief occupies the same place * * * as the orthodox belief occupies.

Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692; 315 P.2d 394 (Dist. Ct. App. 1957).

¹⁰ See *Hackett v. Laird*, 4 SSLR 3102 (W.D. Tex. 1971); *Skelly v. Laird*, 4 SSLR 3128, 3130 (9th Cir.) (Koelsch, J., dissenting), *dismissed as moot*, 4 SSLR 3355 (9th Cir. 1971).

¹¹ 1970 House Hearings at 12611, 12613.

it is tempting to try to specify "objective" criteria for "religious training and belief", i.e., for determining when a registrant's beliefs in opposition to war might be deemed "held with the strength of traditional religious convictions."

These considerations led naturally to the language of LBM 107, which under the heading of "Religious Training and Belief," concedes that sincerity is the primary test of eligibility, but goes on to detail the circumstances that presumably account for the depth and strength of traditional religious beliefs, so that boards can require such circumstances also in the case of moral-ethical objectors.

The fallacy in this is that the circumstances listed, including training, are not necessarily relevant to the underlying test of parallelism that was mandated by the Court.

When, in *United States v. Seeger*, it found three non-traditional religious objectors qualified for exemption, the decision was in no way based on a record of training in their non-traditional religious beliefs that could be viewed as comparable to traditional training. And when *Welsh v. United States*, going one step further, construed the statute to cover a nonreligious, moral-ethical objector also, it again did so without viewing his training as comparable to that of a traditional, or even non-traditional religious individual.

As the Court must have recognized, there is no logical or empirical basis for requiring of the moral ethical objector a showing that he has received a kind of training uncharacteristic of his kind of belief. The typical training in his pacifist belief. In contrast to the teaching and learning of religious beliefs in traditional denominations, which occurs in established religious institutions and constitutes what may be termed "external" training, moral-ethical beliefs are not taught and learned in such formal ways.¹² These facts, not unknown to the Court, suggest that the *Seeger* and *Welsh* decisions implicitly repudiated any concept of "parallelism of training."

It is noteworthy that the LBM refers not only to training but alternatively to "study, contemplation, or other activity" through which ethical or moral convictions were "gained". This listing clearly concedes that moral-ethical beliefs are not acquired as are traditional ones; it is not, however, explained how a comparison for rigorosity, or any comparison for that matter, with a traditional standard could be effected.¹³

B. An alternative rationale: Training as a test of sincerity

It is now settled law that a prima facie CO claim consists of three analytically distinct elements:¹⁴

- (1) *sincere* opposition, by reason of
- (2) *religious training and belief*, to
- (3) *participation in war in any form*.

Of these elements, sincerity alone is not a statutory term; nor is it employed in Selective Service Regulations.¹⁵ However, sincerity enters of necessity into the consideration of a registrant's assertion that he holds a belief which does not permit him to participate in war. Thus it might be argued that a history of training is germane to the issue of sincerity, and hence that the

¹² An exceptional situation may be found to exist in the learning of "ethics" in college and university courses, and in even more formalized manner in the learning of ethical precepts in Ethical Societies (some of which are called Societies for Ethical Culture or Ethical Humanist Societies, and all of which are non-theistic, non-traditional religious organizations). However, even here the learning process does not show the "rigor" characteristic of traditional religious training.

¹³ It is left entirely to individual draft boards whether they should evaluate a CO's claim in comparison to such intensive training as occurs, e.g., in Catholic primary and secondary religious schools; or whether they should apply as the standard the minimal religious training typical of more liberal Protestant denominations such as, say, the Unitarians. Boards will be tempted to apply a standard of training based on their particular experience. A standard so opaque in meaning and so predictably arbitrary in application is open to attack on grounds of vagueness as well as equal protection. Moreover, if it is recognized that substantial training, and a fortiori, rigorous training, is typical of theistic religions but not of non-theistic religious and moral-ethical beliefs, then the training requirement is invalid on the grounds that:

Neither [state nor federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers.
Torcaso v. Watkins, 367 U.S. 488 (1961).

¹⁴ *Clay v. United States*, 403 U.S. 698, 4 SSLR 3258 (1971).

¹⁵ Regulations R1622.11 and R1622.14, SSLR 2080 and 2081, which prescribe the classification criteria for conscientious objectors, do no more than paraphrase part of the pertinent statutory language.

training requirement is valid quite apart from the question of statutory interpretation.^{15a}

LBM 107 blurs the relationship between sincerity (an absolute, yes-or-no question) and depth of conviction (which may be a matter of degree), so that it is unclear from the text to which element of a claim the training requirement should be taken to apply. To compound the confusion, a System memorandum to the House Armed Services Committee stated that LBM 107 incorporates the concept of a "quantum or degree of sincerity".¹⁶

However, the question whether a belief is in fact held by a claimant could not be resolved by an inquiry into specific training unless we can assume that the belief claimed is unlikely to arise save through such training. This assumption is, at least in the case of moralethical objectors, palpably false.

The courts have considered the "holding of a belief" to be a fact relating to the state of the individual's mind which does not lend itself to proof by the ordinary methods of evidence. In respect to sincerity, the courts have considered primarily the claimant's own application, attestations of sincerity by individuals in personal contact with him, and the personal impression made by him at meetings with the local board or other personal interrogators such as FBI agents and Department of Justice examiners (or in the case of in-service CO's, a chaplain and other interviewers).

Former Director Hershey's longstanding concept of sincerity as a personal factor that should be ascertained primarily through personal contact, fully supports this view. He approved the introduction, in 1940, of the Justice Department's hearing procedure for determining the "good faith" of a CO's objections. And when he supported its elimination in 1967, he did so expressly on the sole ground that it had become time-consuming.¹⁷ He soon substituted, administratively, a special policy and procedure for COs at the local board level.¹⁸ And not long thereafter, he amplified and formalized this policy, with emphasis on the "development of sincerity" in a mandatory preclassification interview for any CO claimant whose board found that it could not grant his claim on the basis of the written application alone.¹⁹ For many years, each CO applicant was required to submit written references from individuals who knew him personally and would specifically attest to the "sincerity of [his] professed convictions".²⁰ Finally, General Hershey's legal manual stated that "the ultimate question is the registrant's sincerity, and objective facts are relevant only insofar as they help determine the sincerity of the registrant in his claimed belief, purely a subjective question".²¹

In sum, it seems incontestable that the question of sincerity is not a matter of degree, and is not susceptible of proof by objective evidence; so that a history of training is irrelevant to a determination of sincerity. In any case, to support a training requirement by detour through the concept of sincerity is hopelessly strained. For the statute itself contains the term "religious training and belief," and it is on the proper construction of this provision that the validity of LBM 107 must turn. If the statute will not support the new requirements of the LBM, it would be disingenuous to uphold them on any lesser basis.^{21a}

^{15a} However, the Director has taken the position, in a recent article, that the training requirement of LBM 107 is an interpretation of the term "training" in § 6 (j). Curtis W. Tarr, *Selective Service and Conscientious Objectors*, 57 A.B.A.J. 976 (Oct. 1971).

¹⁶ Memorandum For Counsel, House Armed Services Committee, dated March 18, 1971, from the Office of the Director of the Selective Service System, over the signature of Samuel R. Shaw, Chief, Legislation and Liaison. Copy on file with the Reporter.

¹⁷ 1967 House Hearings at 2652, 2655.

¹⁸ The Deputy Director and General Counsel of the System wrote to the Massachusetts State Director.

In every case in which a [CO] claim is filed * * * it has been the consistent policy of the Director to require reopening. * * * [T]his policy insures * * * [to the CO] the opportunity of a personal appearance.

Letter dated February 21, 1968, see 1 SSLR 25; Silard, *Some Comments on the Local Board Memorandum No. 41 Preclassification Interview*, (hereinafter *Silard on LBM 41*), 2 SSLR 4001, 4002 n. 11 and accompanying text.

¹⁹ LBM 41 as amended July 30, 1968, para. 3(b), SSLR 3174. See generally *Silard on LBM 41*, *supra*, note 18. The present Director rescinded LBM 41 on August 27, 1970. Contrary to standard practice of his predecessor, he did not indicate a reason for the rescission. However, since it followed by just a few weeks and issuance of LBM 107, one might conclude with some justification that the purpose was to eliminate contradictions between LBM's 41 and 107.

²⁰ SSS Form 150, in its several editions up to and including that of February 10, 1966, which remained in use until September, 1968: Series V. "References."

²¹ *Legal Aspects of Selective Service*, 11 (rev. ed. January 1, 1969) (hereinafter *Legal Aspects*) (footnote omitted).

^{21a} The Director evidently shares this view: see his article, n. 15a, *supra*.

III. ABSENCE OF A REQUIREMENT FOR TRAINING IN THE HISTORY OF THE DRAFT LAWS.

A. Early history to 1918

In the early history of the CO exemption in America, there was no criterion of "training" to qualify a CO for relief from military service. The militia service laws of the colonies used such terms as "conscience", "tender consciences", "conscientious scruples", and "scruples of conscience", against the bearing of arms.²²

During the Revolution the above terms were replaced by such phrases as "professing to be conscientiously scrupulous" and "religious principles against bearing of arms." Thus, the focus continued to be on the individual's existing belief, without any requirement of, or reference to, "training."²³

There was no federal conscription until the Civil War, and the 1864 draft law²⁴ became the first federal conscription statute. It relieved from service:

Members of religious denominations who are conscientiously opposed to the bearing of arms and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations.

Thus, membership in a pacifist religious denomination was added for the first time to the earlier requirement of holding a pacifist belief.

When, half a century later, the 1917 draft law²⁵ was enacted, these same basic requirements, i.e., membership in a pacifist religious organization and holding of its beliefs, were adopted.²⁶

In practice, before the First World War was over, many non-pacifists and others who were not members of peace churches, (or of any other religious denomination for that matter), were accorded CO status by confidential administrative action²⁷ which recognized "religious or other conscientious scruples".²⁸ When these actions became known to Congress, they provoked criticism expressed in strongest terms by Rep. Newton on the House floor.²⁹ Yet, his attack was directed exclusively against administrative broadening of the limits of a qualifying belief beyond personally held religious conviction. A significant part of his statement flatly rejects the possibility that Congress had intended to exempt only those who had religious training in pacifist beliefs.

Note, to be exempt from combatant service [the CO] must personally have religious conviction against war. Congress in that has tried to prevent the law from exempting only those who by long religious training and association have conscientious convictions against the war.³⁰

²² L. Schlissel, ed., *Conscience In America, A Documentary History of Conscientious Objection in America 1757-1967* Prefaces to Parts I and II (1968) (hereinafter Schlissel). See also Selective Service System, *Special Monograph No. 11, Part I Conscientious Objection* (1950) (hereinafter S.S. Monograph).

²³ The city of Philadelphia referred in an ordinance on exemption from service to "persons professing to be conscientiously scrupulous against bearing of arms" and to "people sincerely and religiously scrupulous". The Continental Congress urged liberal financial contributions, instead of military service from those "who from religious principles cannot bear arms in any case". Schlissel at 31.

²⁴ U.S. Statutes at Large, 38th Congress, First Session XIII, p. 9.

²⁵ Public Law 12, 65th Congress, An Act to authorize the President to increase temporarily the Military Establishment of the United States, approved May 18, 1917.

²⁶ The pertinent part of Sec. 4 exempted from combat service

any person * * * who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed of principles of said religious organization * * *.

This language differed from that of the predecessor statute in excluding members of denominations which were not in existence at the time of enactment of the law, or espoused pacifism only later. These changes were clearly intended to block a possible proliferation of qualifying denominations. They did not require that the CO have been a member of a qualifying denomination before the enactment of the law. There was no minimum time requirement for the existence of the denomination or of its pacifist tenets prior to enactment, nor for membership of the individual, nor for his own espousal of those tenets. Thus, these narrowed qualification standards did not approach a requirement of training.

²⁷ A large number of persons opposed to the role of the United States in the First World War, on grounds other than pacifism taught by the peace churches, were recognized as conscientious objectors by the armed forces. Some of that opposition was political but many were in fact conscientiously opposed without adhering to the tenets of peace churches. See statement of General Hershey, 1940 House Hearings, at 112; and generally Schlissel, Part IV; Lawrence S. Wittner *Rebels Against War: The American Peace Movement 1941-1960*.

²⁸ Instructions from the Adjutant General of the Army, December 10, 1917, Schlissel at 165; Executive Order of March 23, 1918, *id.* at 171; Order of the Secretary of War of June 1, 1918, *id.* at 167.

²⁹ Congressional Record, 66th Cong., First Sess., at 3063-3066, reproduced in full in Schlissel at 163.

³⁰ *Id.* at 163.

B. Religious training and belief in the 1940 act

The 1940 Draft Law was the first statute to employ the phrase "religious training and belief." The Burke-Wadsworth Bill, which was placed before Congress early in 1940, was originally drafted to revive essentially the 1917 CO provisions. Even though his approach was rejected by Congress, it is significant that its proposed language would have further effected even a trace of implication, if there was one in 1917, with respect to training.³¹ A proposed stipulation that the holding of the belief would have to be "established" under Presidential regulations would have permitted the President to formulate his own ideas with respect to how the holding of the belief would have to be established. But (aside from the fact that Congress rejected such proposed authorization), the proposed language of the bill did not even hint that the President might want to prescribe the existence of training in pacifist beliefs.

Congress, after thorough consideration, abandoned the earlier exemption principle based on the CO's membership in pacifist sects and his espousal of their tenets. It considered with obvious favor substantial testimony urging individual conscience to be the basis for exemption. In the committee hearings, the members discussed in much detail with representatives of the ACLU and of religious organizations a new principle of exemption based on individual pacifist belief, which Congress then enacted in the 1940 Draft Law.³²

But that new statutory language which exempted one

who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form

did not originate with Members of Congress. Instead, it was proposed, verbatim, by witnesses at Congressional hearings. While the peace churches urged broadened standards and recognition of the individual's conscience in general terms,³³ two witnesses, who were obviously highly regarded by the members, made specific proposals for the language of the pertinent part of §6(j). Appar-

³¹ The original bill, H.R. 10132, S.4164 provided for exemption of one:

who is found to be a member of any well-recognized religious sect whose creed or principles forbid its members to participate in war in any form, if the conscientious holding of such belief in such principle shall be established under such regulations as the President may prescribe.

By dropping the requirements that the "religious sect" must have been in existence at the time of enactment of the law and that it must have had pacifist tenets at that time, this bill would have removed the 1917 safeguards against proliferation of qualifying sects. Thus anyone, even though he had just joined a sect which recently embraced pacifism, could have qualified for the exemption.

³² Public Law, 783, 76th Congress, To Provide for the Common Defense by Increasing the Personnel of the Armed Forces of the United States and Providing for its Training, approved September 16, 1940.

³³ Hearings on H.R. 10132 before the Committee on Military Affairs, 76th Cong., Third Sess. (1940) (hereinafter *1940 House Hearings*). Hearings on S. 4164, Selective Training and Service Act before the Senate Committee on Military Affairs, 76th Cong., Third Sess. (1940) (hereinafter *1940 Senate Hearings*).

The Church of the Brethren urged exemption of "those who are opposed to war on the grounds of religious conviction." *1940 House Hearings*, at 369.

The Religious Liberty Association of America in its own and the Seventh Day Adventists' name urged recognition of the "individual conscience, whether [the registrant] belongs to a denomination that has any decreed principle of non-combatancy or not, because many denominations do not teach [it] in their creed, as this bill suggests they must. They proposed insertion of the phrase "or any person, though a member of an organization whose creed or principles do not forbid the bearing of arms but who individually hold religious scruples against the bearing of arms." *Id.* at 151-152. Cf. *1940 Senate Hearings* at 198.

Senator Burke discussed, without opposition, the merits of basing the exemption "purely on creed", a curious contradiction to the provisions of his own bill requiring membership in a peace church. *1940 Senate Hearings*, at 155-156. Senator Schwartz stated that "only religious convictions should be considered." *Id.* at 197.

Rep. Sparkman objected even to this proposal as not sufficiently broad because it did not include "an individual who might not be a member of any religious organization, and who might have conscientious scruples." *1940 House Hearings* at 152.

The Society of Friends urged that the conditions for exemption in Great Britain be followed. Quotations from the British law showed an absence of all consideration of training, *id.* at 618.

Sparkman asked "Do you not believe that the bill ought to be changed so as to take care of the individual conscientious objector?" General Hershey answered that he has "a great deal of sympathy with those people, but [he has] not arrived at a solution how to determine whether he is in fact * * * a conscientious objector". *Id.*, at 126.

Dorothy Day of the Catholic Worker objected to CO exemption on "creed" of a denomination only. She argued for recognition of "the moral issue" affecting all other CO's as well. *1940 Senate Hearings*, at 156.

The Fellowship of Reconciliation urged recognition of opposition based on "religious convictions" and opposition "compelled by the voice of conscience". *Id.* at 245.

The National Council of Methodist Youth stated that "conscience of those who are CO's" be the basis for exemption, rather than membership in peace churches. *Id.* at 261-262.

ently, their arguments impressed the Members so much that both proposals were readily adopted.³⁴ The ACLU offered the phrase:

who is conscientiously opposed to participation in war in any form³⁵ and the Quakers urged the Committee to amplify this further so that the entire pertinent passage would read:

who by reason of religious training and belief is conscientiously opposed to participation in war in any form, and is so found to be a *bona fide* objector as hereinafter provided *** [by referring his case to the Department of Justice for inquiry and hearing *** regarding the character and good faith of the objection].³⁶

Ultimately, Congress elected the language proposed by the Quakers with one minor and one significant modification. The former made clearly mandatory the holding of a hearing. The latter emphasized that the hearing is to concern the good faith of the "person concerned", rather than that of his denomination:

[The hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned.

Thus, all indications from the 1940 Committee hearings support the view that none of the members thought in terms of a determination of sincerity by means other than personal confrontation.³⁷

The Committee Reports³⁸ are entirely silent on the subject, but the debates in the House and Senate are illuminating. For instance, Senator Sheppard said that "any of those men may be exempted if they will show that they have conscientious objections to killing people in war, whether he is a member of one of the [religious groups] or whether he belongs to no church at all", depending "upon what the individual thinks, regardless of the organization to which he belongs", and finally, that "the bill operates on the basis of what the particular individual believes as to war".³⁹

In view of such clear history of the statutory phrase "religious training and belief", it is fair to state that neither those who proposed it, nor those who heard, considered and accepted it (with the exception of two Senators, Reynolds and Minton, who wanted to retain the requirement of belonging to a peace church)⁴⁰ thought that this language required, in addition to the holding of a pacifist belief, a demonstration of training or some other process which resulted in that belief. The inescapable conclusion is that the term "training" was included without any intention to give it substantive meaning. Thus, the term "training" was surplusage from the outset.

³⁴ Senator Reynolds proposed that at least 12 months affiliation with a pacifist religious organization should be required, to obviate the "terrible racket" in World War I. *Id.* at 59. And Senator Minton argued, also unsuccessfully, that only those should be exempt who had early childhood pacifist training. He stated that only the Quakers and other peace church members have "learned" their pacifist beliefs "at their parent's knees * * * from childhood." *Id.* at 189-190.

³⁵ 1940 *House Hearings*, at 191. See also 1940 *Senate Hearings*, at 308.

³⁶ 1940 *House Hearings*, at 211. See also 1940 *Senate Hearings* at 164.

³⁷ Rep. Elston asked "Do you think the mere declaration that he is a conscientious objector should be enough?" The spokesman for the Religious Liberty Association of America and for the Seventh Day Adventists answered: "Well, I do not know. I think I would want to test him out somewhat to see if he were sincere or not." And, Rep. Elston commented: There might be some difficulty in that test." 1940 *House Hearings*, at 155.

The ACLU spokesman opined, without comment by the Senators present, that the Quakers' proposed language would properly establish the sincerity of the objection by personal confrontation. He also answered Senator Sheppard's question about how to ascertain sincerity by citing the British system's provisions (which it not have any reference to training). To the Chairman's further question how those provisions help to find out who is "honest", the witness stated that whether the registrant had these views before the war broke out may be considered, but if he has taken a stand before and is known to trustworthy witnesses to be a conscientious objector, "that is pretty good evidence of his genuineness". Finally, Chairman Sheppard mentioned the possibility of the use of lie detectors, but the point was not pursued further. *Id.* at 308.

The Quakers urged in the strongest terms that "every man should follow his best lights and his best conscience", that "any man with a sincere conviction" and not just peace church members should be exempted, and that "individual conscience" must be recognized. 1940 *House Hearings*, at 204 *et seq.*

³⁸ House Report No. 2903, Senate Report No. 2002, Conference Report [House Report] No. 2937.

³⁹ Cong. Rec. 76th Cong., 3d Sess., at 1016.

⁴⁰ *Id.*, at 10749

C. The 1948 statute and its 1951 amendments

The legislative history of the 1948 Draft Law⁴¹ is important for our argument as it shows Congress' continued lack of concern with "religious training" while at the same time substantial changes with respect to "religious belief" were considered and later enacted. The question whether or not the 80th Congress intended to narrow the standard for a qualifying belief became, years later, a much debated point.⁴² But neither the Supreme Court nor legislators or commentators ever took this question to touch upon religious training.

The legislative history of the 1948 statute is, for a number of reasons, rather sparse. The only hearings before the House Committee⁴³ were on an early House bill, H.R. 6401 which the Committee later set aside in favor of the consideration of the Senate bill S.2655; on the latter it held no hearings. The Senate Committee did hold very extensive hearings,⁴⁴ but not on S.2655, which was the result rather than the topic of the Committee's consideration. It was written by the Committee and introduced in the Senate only after the Senate Committee completed open hearings, closed hearings and its own debates. What the Committees of both houses had before them originally were recommendations of the government for the introduction of universal military training (UMT) rather than a selective service law. No questions were asked of witnesses with respect to the CO provision; but the Brethren⁴⁵ and the NSBRO (National Service Board for Religious Objectors)⁴⁶ volunteered proposals for the definition of a conscientious objector to include one who has "humanitarian convictions", and urged that "deep personal convictions must be the factor to be considered, whether they are expressed in a conventional form or not". The Mennonites' written statement⁴⁷ urged that "complete exemption from the draft be provided for all those whose conscience sincerely forbids them to accept any form of conscription" and that the exemption be extended to "those whose conscience forbids them to have any part in war or any preparation for it * * *". None of these statements evoked any critical comment of the members. Thus, the intent of the Committee to change the CO qualification provisions with respect to religious belief did not materialize until, behind closed doors, it wrote the Supreme Being clause into the bill.

The Senate Report⁴⁸ sheds further light on how legislative intent evolved in executive session. The report relates that, after three weeks of open hearings, the Committee held fully three more weeks of closed hearings (at which only

⁴¹ Selective Service Act of 1948, Public Law 759, 80th Cong., approved June 24, 1948. The pertinent passage of §6(j) exempted anyone who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code.

⁴² *United States v. Seeger*, 380 U.S. 163 (1965), developed the theory that Congress' new requirement in 1948, involving a Supreme Being, was but a clarification of the previous statutory language requiring "religious training and belief" and that the reference in the 1948 Senate Report to *Berman v. United States* was intended not to point to what *Berman* did not say than what it did say. This reasoning evoked from Senator Russell, in the 1967 Senate Hearings, a statement of regret that the Senate had failed to establish, in 1948, a legislative intent to narrow the standard rather than broaden it. Various facets of the intriguing questions growing out of the just-mentioned *Seeger* rationale were analyzed by numerous commentators, but all analyses were limited to a consideration of "religious belief" and did not touch upon training". Brodie and Southerland, *Conscience, the Constitution, and the Supreme Court: The Riddle of the United States v. Seeger*, 1966 Wis. L. Rev. 306; Todd, *Religious and Conscientious Objection*, Stan L. Rev. 1734; Rabin, *Do you Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption*, 1967; Wis. L. Rev. 642; Reisner, *The Conscientious Objector Exemption: Administration Procedures and Judicial Review*, 35 U. Chi L. Rev. 686; Silva, *The Constitution, the Conscientious Objector, and the "Just" War*, 75 Dickinson L. Rev. 1; Rabin, *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise* (hereinafter Rabin on *Seeger*), 51 Corn L. Q. 231 (1966).

⁴³ Hearings on Universal Military Training before the Committee on Armed Services, House of Representatives, 80th Cong., 2nd Sess., (hereinafter 1948 House Hearings), unpublished.

⁴⁴ Hearings on Universal Military Training before the Senate Committee on Armed Services, 80th Cong., 2nd Sess. (hereinafter 1948 Senate Hearings).

⁴⁵ 1948 Senate Hearings at 749.

⁴⁶ *Id.* at 752-753.

⁴⁷ *Id.* at 756-759.

⁴⁸ Report to Accompany S. 2655, S. Rep. No. 1268.

government representatives appeared) and then met alone for ten more days.⁴⁹ The only statement of the Report on the CO provision, reads, in pertinent part:

This section [6(j)] re-enacts substantially the same provisions as were found in subsection 5(g) of the 1940 Act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being is conscientiously opposed to participation in war in any form. (See *U.S. v. Berman*, 156 F.2d 377, cert. denied, 329 U.S. 795). Elaborate provision is made for determining claims for exemption on this ground * * *.⁵⁰

This statement of the Report indicates not only Congress' lack of interest in religious training, but also a focus on determination of sincerity by personal contact rather than by documentary evidence of facts such as training. The Report did not indicate what those "elaborate provisions" were. In fact, the language of the bill submitted with the Report did not make any new provisions for "determining claims to exemption" but simply retained the predecessor Act's provisions for the Department of Justice inquiry and hearing.⁵¹

But Congress itself furnished the most conclusive support for considering "religious training" as having no substantial meaning, when it wrote into the statute:

Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code.

Congress here simply ignored the existence of the term "training" and, quite inartistically, defined "training and belief" as a specifically circumscribed "belief".⁵²

In enacting the 1951 amendments⁵³ to the 1948 Act, Congress reviewed section 6(j) only with respect to alternate service and discussion by the committees was without any reference to the CO classification provision.⁵⁴ Nor the debates in the Senate⁵⁵ or in the House⁵⁶ touch upon the qualification standards.

In sum, the legislative history of the 1948 Act conclusively shows continued lack of congressional interest in "religious training" and absence of all interest to put meaning into this statutory term. It remained surplusage.

D. The 1967 draft law

The 1967 re-enactment of § 6(j), from which the Supreme Being clause was deleted, was effected by a remarkable coalition of two factions. One consisted of those in Congress who thought that a narrowing of the standard could be achieved by returning to the 1940 language. The second consisted of representatives of religious bodies, peace organizations, the ACLU and others, who, on the contrary, took the amendment to signal acquiescence in the *Seeger* decision.⁵⁷

⁴⁹ *Id.* Section II: The Committee Hearings.

⁵⁰ Report, *supra* note 48, Section VI: Section-by-Section Analysis, at 14.

⁵¹ The House Committee Report does not contribute anything to this question as it lacks all reference to conscientious objection. Report No. 1881 to Accompany H.R. 6401, (which bill later was set aside in favor of the consideration of S. 2655). The Report states that only military men and scientists appeared at the hearings. H.R. 6401 did not include among the proposed exemptions one for conscientious objection. *Id.* at 10. The transcript of the hearings was not published for general distribution.

⁵² Neither the *Seeger* Court nor any of the commentators has pointed to the fact that the 1948 statute introduced this expression for the first time.

⁵³ The enactment also changed the short title to "Universal Military Training and Service Act" as Public Law 51, 82nd Cong., approved June 19, 1951.

⁵⁴ Hearings on S.1, University Military Training and Service Act of 1951, before the Senate Committee on Armed Services, 82nd Cong., 1st Sess. (1951) (hereinafter *1951 Senate Hearings*). Representatives of church organizations, including the peace churches, urged without opposition that individual conscience be accepted as the basis of CO status. *Id.* at 561, 618, 620, 701. See also Senate Report No. 117, at 69.

Hearings on S.1, Universal Military Training and Service Act of 1951, before the House Armed Services Committee, 82nd Cong., 1st Sess. (1951) (hereinafter *1951 House Hearings*). The representative of the Quakers elaborated on refusal of participation in war on the grounds of conscience. There was no reference to training. *Id.* at 5251. See also House Reports Nos. 271 and No. 535 (Conference Report).

⁵⁵ Congressional Record, 82nd Cong., 1st Sess., at 1990.

⁵⁶ *Id.* at 3394.

⁵⁷ This was a further amendment of the 1948 Act, with the new short title Military Selective Service Act of 1967. The pertinent part of the new language for the standard of qualification exempted anyone

who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological or philosophical views, or a merely personal moral code.

The Committee hearing⁵⁸ brought to light the confusion initiated in 1948 when the Senate Report described the Senate bill as "re-enacting substantially the same provision as were found in the 1940 Act", even though it introduced, in fact, the important Supreme Being clause.⁵⁹ Both General Clark and General Hershey insisted that the *Seeger* Court's interpretation of the 1948 Congressional intent was contrary to fact since the 1948 Supreme Being clause was designed to narrow the standard. General Clark said that, against the background of that Supreme Court decision, removing the Supreme Being clause would have to be clearly recognized as Congressional intent to narrow the standard.⁶⁰ General Hershey, however, was much less certain about the effect to be expected. He said that while deleting the Supreme Being clause should be understood as an intention to narrow the standard, the Supreme Court might yet interpret it as a broadening.⁶¹ None of the colloquy touched

⁵⁸ The House first held hearings in 1966: Hearings on the Review of the Administration and Operation of the Selective Service System before the House Committee on Armed Services, 89th Cong., 2nd Sess. (hereinafter *1966 House Hearings*). The bill, S. 1432, was introduced in the Senate early in 1967, and discussed in Hearings on S. 1432 to Amend the Universal Military and Service Act and for Other Purposes (Selective Service Act of 1967) before the Senate Committee on Armed Services, 98th Cong., 1st Sess. (hereinafter *1967 Senate Hearings*). This was followed by Hearings on the Extension of the Universal Military Training and Service Act before the House Committee on Armed Services, 90th Cong., 1st Sess., H.R. Rep. No. 12 (hereinafter *1967 House Hearings*).

⁵⁹ The *Seeger* Court, in support of its decision, referred to this statement in the Senate Report, 380 U.S. 163, 173 (1965).

⁶⁰ At the *1967 Senate Hearings*, General Clark squarely contradicted himself. First, as Chairman of the Civil Advisory Panel on Military Manpower Procurement, he proposed "that Congress give consideration to returning to the language that dealt with the subject [of conscientious objectors] in the Draft Act of 1940," *id.* at 20. But shortly thereafter, he said that the boards should determine that "a fellow is a conscientious objector who believes in a Supreme Being." *Id.* at 34. "My own personal feeling is that if a man can be proven sincerely and conscientiously (*sic*), that he has this belief in a Supreme Being rather than a tobacco plant or a tree or something of that kind, that it is wrong for him to bear arms, then I think the board should determine that he is a conscientious objector," *id.* at 35.

Similarly, before the House Committee, he first read the same recommendation of his panel, *1967 House Hearings* at 2552, 2553, but later made the conflicting statement that "now [the Supreme Court had made] it so, a man just has to have a belief in anything. It doesn't have to be in a supreme being." *Id.* at 2574.

⁶¹ General Hershey's statement was, perhaps less contradictory. When asked about deleting the Supreme Being clause, he answered.

In the first place, I didn't think that we should put it in, in 1948. Another agency of Government wanted it in because they thought it narrowed the definition of religion. I wasn't prepared to argue that. But, on the other hand, I think personally that when you start trying to define religion, you get into more trouble than you get out. Either a person knows what they think religion is or they don't, and if you start telling them, you will just simply get yourself wound up more. . . . But anyway, I have gone on the assumption that if the Supreme Court thought they widened the law, that, therefore, taking it out would narrow it, and if that is true, I am for it. *1967 Senate Hearings*, at 617.

Before the House Committee he said:

Anyway, I have felt that maybe if the Congress removed the Supreme Being, it would be evidence that they didn't put it in to broaden it, but on the other hand, I wouldn't want to bet it wouldn't be taken as more evidence of broadmindedness. *1967 House Hearings* at 2636.

And when asked whether he would be in favor of taking out the Supreme Being clause, "going back to the oldtime religion," he answered: "Well, I think I have felt the more you try to define religion, the more difficulties you get into." *Id.* at 2652.

Senator Erwin doubted the justification for exempting one whose belief is "fallible" because non-theistic and therefore no more than a matter of man's own "mind". *1967 Senate Hearings* at 409. But the religious organizations and others, in urging a broadened standard, spoke mostly in terms of the recognition of "individual conscience" rather than "theistic belief".

The exchange with three of these witnesses is particularly significant. First, the representatives of the Quakers, the very same organization which had proposed in 1940, as a broadening of this standard, the "religious training and belief" phrase, now again urged "broadening the definition of a 'conscientious objector' to include those whose basic motivation is a conscientious opposition to war: but who cannot state their position in religious terms." *Id.* at 362. This drew no comment from the members.

Second, the representative of the Washington Ethical Society made an elaborate statement urging elimination of the Supreme Being clause and recognition of non-theistic, non-traditional beliefs. He described the Ethical Religious Movement and identified it as being in this category. Senator Russell asked him many questions directed to that movement's members' qualification for the exemption. But not a single question was addressed to whether there is any training in the beliefs of that movement. Senator Symington asked only about pacifists, atheists, and selective objectors among the members. Senator Miller asked about the number of members, about membership cards, the paying of dues, about veterans and those among the members, then on military duties and whether membership alone would suffice for CO status. *Id.* at 340-356.

Third, the ACLU representative urged the adoption of a standard for qualification which would be based essentially on nothing but the depth of conviction of a pacifist

upon religious training either as an independent requirement or as a basis for evaluating sincerity.

The House Committee heeded those who urged a return to the 1940 language. It reported out a bill in which the Supreme Being clause was deleted from § 6(j). As a rationale for the recommendation, it referred only to the broadening of the basis for qualification by the Supreme Court's *Seeger* decision that could result in a substantial increase in unjustified appeals, and urged the need to return to language in which the objection "must be based on 'religious training and belief.'"⁶²

But, so as to effect the ultimate compounding of confusion with respect to Congress' intention, Senator Russell, when he placed the Conference Report before the Senate and urged the deletion of the Supreme Being clause, said "We dropped the * * * belief in a Supreme Being. In my opinion this action is somewhat in accordance with the recent ruling of the Supreme Court."⁶³

All the above statements concerned only the nature and content of the belief; not a single statement made a link to training or other processes by which a belief is acquired. Nor was there any statement or implication that the sincerity of the asserted belief could be ascertained from whether or not there was such training, or similar process. Therefore, "training" as part of the phrase "religious training and belief" continued to lack any substance or meaning.

E. The 1971 statute

The legislative history of the 1971 Draft Law⁶⁴ has produced further, and decisive, evidence of Congress' lack of interest in training as a requirement. The Director initially (in 1970) felt that it would be unwise to ask Congress to change the qualification provisions.⁶⁵ He thought that the criteria he had just issued in his LBM 107 would be sufficient.⁶⁶ But when, by the beginning of 1971, he realized that the House Armed Services Committee had decided to go along with its Chairman's proposal for three years of alternative civilian service as evidence for the CO's "sincerity," he changed his mind. He made it known to the Committee that this would counter his own efforts to insist on training and other elements in a conscientious objector's life as the most essential evidence of sincerity. But concurrently with that he proposed to the Committee⁶⁷ that if the language of section 6(j) should not be left unchanged, it should be amended to exempt one

who, by reason of convictions or beliefs gained through training, study, contemplation or other activity is conscientiously opposed to any participation in any form of war. As used in this subsection, "convictions and beliefs" include views which are found in traditional religious principles and views which are based on a deep, sincere, and meaningful belief of an ethical and moral origin and content which occupy, in the life of its possessor, a place parallel to that of the beliefs of a traditionally religious person and imposes (*sic*) a compelling duty of conscience about what is right or wrong and what should or should not be done.⁶⁸

In spite of the Director's considerable efforts to have this proposal passed,⁶⁹ it was brushed aside by the Committee as unnecessary. The final House Committee Report specifically stated its preference for the existing language

belief, and he specifically pointed to the meaninglessness of training as a basis for pacifism, since the same training leads one man, but not another, to conscientious objection. *Id.* at 416-418.

The depth and specificity of the hearings in the Senate was not duplicated by the House Committee, but the statements of witnesses, including members of Congress who appeared, the peace and religious organizations, and the ACLU were much the same. 1967 *House Hearings* at 2032-2463. They included arguments for the recognition even of spontaneous "conversion at any time". *Id.* at 2404.

⁶² *House Report No. 267*, at 31.

⁶³ Congressional Record, 90th Cong., 1st Sess., at 15426.

⁶⁴ Selective Service Act, 50 U.S.C. App. §§ 451-472, as amended (1971).

⁶⁵ 1970 *House Hearings*, at 12612.

⁶⁶ *Id.* at 12611.

⁶⁷ Memorandum of March 18, 1971, addressed to Counsel of the House Armed Services Committee, *supra* note 16.

⁶⁸ It will be noted that the present language excluding essentially political, sociological or philosophical views or a merely personal moral code, was dropped in the Director's proposal. Informal inquiries have not elicited a clarification why this was done.

⁶⁹ The official memorandum of March 18, 1971, no. 67 *supra*, with the proposed wording attached, was also handed to every member of the Committee.

"defining a conscientious objector" and gave as one of its reasons the fact that the System had issued its "guidelines."⁷⁰

Thus the legislative history of the 1971 Act has strengthened the arguments herein, in the rejection by the House of an attempt to inject into the statute specific language requiring "training, study, contemplation, or other activity."⁷¹

IV. JUDICIAL AND OTHER INTERPRETATIONS

A. Supreme Court

In *United States v. Seeger*, three passages, all characterized by the Court as "the test", mutually overlapping and partially paraphrasing each other, are presented as constructions of the 1948 statutory language in which "religious training and belief" was defined by the Supreme Being clause. The Court predicated these three constructions on its conclusion that the Supreme Being clause did not narrow the 1940 language and that therefore, "all that is required here" is "to have a conviction based upon religious training and belief."⁷² But none of these "tests" reflects on training.

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God" was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.⁷³

* * * * *

Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.⁷⁴

* * * * *

While applicants' words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"⁷⁵

The Court may thus be said to have done exactly what Congress did in 1948.⁷⁶ In other words, it ratified the 1948 language which says: "Religious training and belief means a belief * * *."

The Court gave some consideration to the development of Seeger's belief (and to a lesser degree to that of the other petitioners), and dealt in detail with the general question of internal versus external derivation of beliefs.

At the outset, the trial court had before it a record containing Seeger's disavowal of training, in his application for CO status, on the requisite SSS Form 150, he had deleted the printed words "training and". Yet the government did not rely upon this disavowal as it certainly would have if it believed that training is a valid, independent standard. Instead, the government urged that Seeger's belief failed the requirement for a "religious belief" because it was an

⁷⁰ H.R. Report No. 92-80, at 14. The very deliberate refusal by Congress to alter the statutory qualifications, as judicially construed, is reaffirmed in the Conference Report, SSLR 2000:1, at 2000:11. This is especially noteworthy since neither House had made any change in the pertinent language.

⁷¹ The new regulation dealing with CO Standards, R1622.14, effective Dec. 10, 1971, apparently acquiesces in this interpretation, for the phrase "by reason of religious training and belief, found in the former R1622.14, has been dropped. Compare text at SSLR* 200:21 with that of the previous version, SSLR 2081—Ed.

⁷² 380 U.S. 163, 176 (1965).

⁷³ *Id.* at 165.

⁷⁴ *Id.* at 176.

⁷⁵ *Id.* at 184.

⁷⁶ 1967 Senate Hearings, n. 58 *supra.*, at 617.

internally defined one rather than, as demanded by the Supreme Being clause, an externally compelled belief.

The Court of Appeals for the Second Circuit, unlike the trial court, rejected this interpretation in language that the Supreme Court quoted with approval.⁷⁷

The holding that the Supreme Being requirement distinguished "between internally derived and externally compelled beliefs" and was therefore an "impermissible classification",⁷⁸ gives strong support to our argument that a requirement of training cannot be valid.⁷⁹

It can also be seen, if this is deemed necessary, that the courts made no connection between a registrant's sincerity in the assertion of his belief and the fact that he had training, for they upheld Seeger's sincerity in the face of his flat disavowal of training.

In its decision in *Welsh v. United States*,⁸⁰ the Supreme Court re-interpreted the meaning of "religious training and belief" so as to include purely moral and ethical beliefs. In comparing the background of *Welsh* with that of *Seeger*, the Court said that "in neither case was [the registrant's] church one which taught its members not to engage in war", that "neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System," and that both men disavowed in writing religious training by striking this pre-printed term from the application form.⁸¹

Gillette v. United States and *Negre v. Larsen*, decided together,⁸² turned on the issue of selective objection. However, certain aspects of the decision are relevant here. For the Court said that the Establishment Clause would forbid not only "obvious abuse" by religious discrimination on the face of the statute, but also "gerrymanders" that would be "subtle departures from neutrality".⁸³ This dictum would seem to preclude an attempt to require a showing of training, where such training is characteristic only for a traditional "cluster of religions". True, the requirement might, under *Gillette*, be saved by showing a neutral, secular basis for excluding those who lack training; and arguably the

⁷⁷ 380 U.S. at 167.

⁷⁸ 326 F.2d at 846.

⁷⁹ The Supreme Court, after quoting the Appeal Court's language on "externally compelled beliefs", modified this language in its own holding: "Of course, as we have said, the statute does not distinguish between externally and internally derived beliefs. Such a determination would, as the court of appeals observed, prove impossible as a practical matter and we have found that Congress intended no such distinction." 380 U.S. at 186.

⁸⁰ 389 U.S. 333, 3 SSLR 3001 (1970).

⁸¹ Several commentators have urged the view that *Seeger* and *Welsh* nullified the entire statutory phrase "religious training and belief". One commentator states that *Seeger* actually construed "religious training and belief" rather than, as it would appear, the Supreme Being clause, and concludes that the Court has "eliminated the statutory phrase" as a criterion for determining eligibility for exemption, leaving only sincerity and objection to all war as the basis. Silva, n. 42 *supra*, at 5, 12. A similar view is taken by a commentator who states that *Welsh* has virtually eliminated the religious training and belief requirement by "effectively reading it out of the statute." Note, *Conscientious Objectors*, 70 *Colum. L. Rev.* 1426 (1970). An alternative interpretation is that "religious belief" has been construed extremely broadly to cover all conscientious belief whether it be traditionally religious, non-traditional religious, or moral-ethical, and that "religious training" did not have to be read out of the statute because the Court considered it surplusage.

Another commentator, discussing *Schacter*, n. 91 *infra*, draws from it the conclusion that evidence of religious training is irrelevant since it would not be evidence that a present belief is a "product of that training." He also feels that, under *Seeger*, a proper standard would define the CO exemption in terms of sincere and strong opposition to war, without regard to the derivation of the belief. T. Todd, *Religious and Conscientious Objection*, 21 *Stan L. Rev.* at 1744 (1969). Still another commentator expresses the view that "religious training and belief" must be thought of as a "single concept". CCCO *Handbook For Conscientious Objectors* 47, (11th ed. 1971). Finally, a witness appearing in 1967 before the Senate Armed Services Committee evaluated *Seeger* as pointing in the direction of a "depth-of-conviction standard". Statement of Aryeh Neier, then Director of the New York Civil Liberties Union and now of the ACLU, 1967 *Senate Hearings* at 416.

⁸² October term 1971, Nos. 85 and 325, respectively, 401 U.S. 437, 3 SSLR 3741 (1971).

⁸³ Citing *Waltz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Pp. opinion of Harlan, J.) and other decisions, the Court said:

Of course this contention of de facto religious discrimination, rendering § 6(j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6(j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses.

401 U.S. at 452.

state's interest in enabling the administrative process to distinguish between sincere and insincere CO claims is a valid, pragmatic consideration. But the Court in *Gillette* recognized also that there is a distinct line beyond which the System must tolerate difficulties in weeding out "spurious claims;" thus the Court has deemed the determination of sincerity of a general objection to war "a commonplace chore".⁸⁴

Nor can the state's need for soldiers be a sufficient secular basis for discriminatory rules, since it is hopeless to expect to convert a conscientious objector into an effective fighting man. There is no reason to assume that there is more hope for such conversion when the CO's belief, although truly held, has not come about as a result of rigorous training.

In *Gillette*, the Court was concerned that the recognition of selective objection might pose a danger of unintended religious discrimination, because some selective objectors' beliefs exhibit features characteristic of the more conventional religions:

[A] claimant's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear.⁸⁵

It would be difficult to deny that a requirement of "training *** or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated" improperly demands precisely such a connection with conventional religiosity. *Seeger, Welsh and Gillette*, taken together, decisively reject such a possibility.

Ehlert v. United States,⁸⁶ a decision which deals with re-opening of a post-induction order CO claim, not only furnishes authority for placing limitations on the sway of administrative convenience, but also reflects once more the Court's lack of concern with training. A claim maturing after issuance of an induction order may have but scant connection with previous training. Yet, the Court based its decision narrowly on the issue of the validity of the regulation that apportions post-induction order claims to a military forum.

B. Lower courts

Several lower court decisions explicitly rejected the government's attempt to uphold training either as an independent requirement for eligibility or as a test of sincerity.

In *Kern v. Laird* the court said:

[A] legal requirement of such a history [of training] is clearly a misstatement of the law. *** [T]he beliefs of Kern clearly occupy a place in his life equivalent to that normally held by conventional religious beliefs and thus would seem to meet the tests of *Welsh* and *Seeger*. *** A person's sincerity cannot fairly be tested by the length of his training any more than it can by the glibness of his tongue.⁸⁷

In *re Hansen* required that "training and belief" be viewed as a unitary concept.⁸⁸ *United States v. Sisson* rejected the notion that the ancestry of the belief gives it legitimacy.⁸⁹ In *re Nissen* attributed to Congress the intention to regard training only as experience supporting belief.⁹⁰ *United States v. Shacter* found qualified a registrant whom it termed an untrained atheist.⁹¹

There is also a long line of cases, decided before *Ehlert*, which upheld late claims made under circumstances that virtually assured an absence of rigorous

⁸⁴ 401 U.S. at 457.

⁸⁵ 401 U.S. at 458.

⁸⁶ 402 U.S. 99, 4 SSLR 3001 (1971).

⁸⁷ 4 SSLR 3776 (D. Colo. 1971).

⁸⁸ 148 F. Supp. 187, 190 (D. Minn. 1957):

[N]o attempt is made in the statute to define training and belief as separate elements. The phrase is defined in toto as a single concept, and to attempt an independent consideration of the word training would be to ignore the apparent scheme of the statute.

⁸⁹ 1 SSLR 3354, 297 F. Supp. 902 (D. Mass.), appeal dismissed, 399 U.S. 267, 3 SSLR 3017 (1970): "It is not the ancestry but the authenticity of the sense of duty which creates the constitutional legitimacy."

⁹⁰ 146 F. Supp. 361, 363 (D. Mass. 1956):

[S]o far as Congress was thinking of training, it regarded it as meaning no more than individual experience supporting belief.

⁹¹ 1 SSLR 3272, 293 F. Supp. 1057 (D. Md. 1968):

[It is the] untrained atheist's belief that there is holiness in human life that makes it sinful to kill.

training. In *United States ex rel. Tobias v. Laird*,⁹² and *Ross v. McLaughlin*,⁹³ the courts recognized that the belief on which the objection was based was triggered by events in Vietnam, yet the petitioners qualified for the exemption. In *Gresham v. Franklin*,⁹⁴ the applicant was granted release from the Army even though he made his claim after he received orders for Vietnam and it was established that this triggered his objection. In *United States v. St. Clair*,⁹⁵ a conscientious objector had stated that his beliefs were relatively new; he made a connection between this "new objection" and the fact that he had recently attended a peace rally. The Court of Appeals rejected the board's finding that these facts implied a lack of sincerity. In *United States v. Crownfield*,⁹⁶ the court found that the FBI resume was replete with glowing accounts of defendant's sincerity and honesty, yet the Department of Justice's recommendation was adverse because of the lateness of the claim and a belligerent attitude of the registrant toward the Selective Service System. Citing *Scott v. Commanding Officer*,⁹⁷ the court reversed this registrant's conviction on a record which lacked all evidence of training.

Of special import are cases involving military personnel who have already served some time either in the reserves or on active duty and seek discharge as conscientious objectors. The Army Regulations on in-service conscientious objection recognize that some such claims are made "late".⁹⁸ A most convincing example is that of an Army cadet who wanted to resign from West Point because his newly developed conscientious objector belief did not permit him to remain. In *United States ex rel. Donham v. Resor*,⁹⁹ the court found no valid basis for denying Donham's claim in the hearing officer's disbelief that a West Point cadet could possibly develop conscientious scruples against the war. And in *United States ex rel. Lohmeyer v. Laird*,¹⁰⁰ the court said, "If the length or type of religious training, formal or informal, were the test, the sincerity of the conversion of Saul on the road to Damascus might be open to question."

When a man in the reserves, or on active duty, develops a qualifying belief, this comes about in spite of rigorous military training to the contrary. It

⁹² 2 SSLR 3212, 413 F.2d 936 (4th Cir. 1969). The court stated with emphasis "all three officers making recommendations recommended classification as a conscientious objector" and remanded the case to the District Court with instructions to order the Army to grant CO status to Tobias.

⁹³ 2 SSLR 3536, 308 F. Supp. 1019, 1024 (E.D.Va. 1970).

⁹⁴ 3 SSLR 3206, 315 F. Supp. 850 (N.D. Cal. 1970).

⁹⁵ 1 SSLR 3224, 293 F.Supp. 337 (E.D.N.Y. 1968).

⁹⁶ 3 SSLR 3833, 439 F.2d 839 (3rd Cir. 1971).

⁹⁷ 3 SSLR 3277, 431 F.2d 1132 (3d Cir. 1970). See also *United States v. Freeman*, 1 SSLR 3012, 388 F.2d 246, (7th Cir. 1967); *Miller v. United States*, 1 SSLR 3014, 388 F.2d 973 (9th Cir. 1967); *United States v. Stafford*, 1 SSLR 3040, 389 F.2d 215 (2d Cir. 1958); *United States v. Baker*, 1 SSLR 3017, — F. Supp. — (E.D.N.Y. 1968).

⁹⁸ AR 135-25, Army National Guard and Army Reserve, Disposition of Conscientious Objectors, Section 5a. SSLR 2333. This regulation was revised in conformity to the revision of DoD 1300.6, SSLR 2325, to conform with *Welsh*. The revision includes replacing "religious training and belief" in § 3 (b) with "deeply held moral, ethical or religious beliefs" thereby deleting the earlier reference to training. Also conforming to the revision of the Directive, the title for section 6a, paragraph 2, "Religious training and belief," was replaced by "Religious training or beliefs held."

The Army Chaplains are assigned the role of first interviewers of all Army men who intend to apply officially for CO status, AR 635-20, Section 4b(2). Therefore, it is significant that the official manual of the Army Chaplain School that teaches the chaplains the requirements for conscientious objector status, discusses the "religious training and belief" standard solely with respect to belief and without reference to training, *United States Army Chaplain School, Fort Hamilton, New York, publications ST16-60-1, Counseling the Conscientious Objector*, July 1, 1969. This publication is in the process of being revised so as to take account of *Welsh*.

The same holds true for the Army Chaplain School's lesson material for the correspondence course for non-resident chaplains, Army Correspondence Course, Subcourse, No. CH 141, *Counseling the Conscientious Objector*, July 1, 1969. This multiple choice questionnaire contains a four-choice question on how the sincerity of a claimant can best be determined by "objectively" considering his professed "belief". The expected correct answer is "The Actions which grew out of [that belief]". The three incorrect answers are: "The Biblical support [the applicant] can provide"; "The family training out of which [the belief] grows"; and "The Teachings of the denomination to which [the applicant] belongs". *Id.* at 4. Correct answer obtained in oral communication from the Army Chaplain School.

⁹⁹ 3 SSLR 3550, 318 F. Supp. 126 (S.D.N.Y. 1970), *rev'd.*, 3 SSLR 3548, 436 F.2d 751 (2d Cir. 1971). A number of those with intimate contacts with Donham certified to the sincerity and depth of his evolving scruples of conscience.

¹⁰⁰ 3 SSLR 3072, 318 F.Supp. 94, 102 (D.Md. 1970).

would be impossible to attribute his belief to some earlier "training or other process comparable to traditional religious training."

Indeed, since under *Ehlert* the armed forces are to process for discharge only those whose claims became fixed after the issuance of an induction order, a requirement of training would be even more anomalous here than in the case of the preinduction claim. The pre-1971 DoD 1300.6 reflected this fact in its lack of emphasis on training.¹⁰¹

C. Other interpretations

After the introduction, in 1940, of the "religious training and belief" standard, the Justice Department apparently needed a clarification of "religious training". General Hershey supplied an interpretation which gave explicit preference to belief over training: he criticized and rejected the "schoolmaster's" approach that would look for "hours or years of study," and pointedly stated that the question is only whether the registrant "gets" the belief, with respect to a rapidly or suddenly developed belief, he propounded a theory that in these cases "a lifetime of training" is "crammed into one hour."¹⁰²

The Director's first official report to Congress, issued about the same time, expressed similar views and indicated that they had been communicated to the Boards so as to counter any tendency to apply "religious training and belief" in a narrower way than his own. The report took the position that it sufficed if the holder of a qualifying belief was exposed, "if only subjectively" to the ethical concepts of a "religious civilization"; and it termed a belief qualifying if it has "roots in the same soil" from which religious convictions also spring.¹⁰³

After Congress introduced the "Supreme Being" clause into the 1948 statute, Selective Service again had an opportunity to analyze the standard. The System's study of the conscientious objector exemption considered the new statutory standard in great detail and depth, yet it completely ignored the statutory term "training",¹⁰⁴ indicating that by that time the Director may have considered the question moot.

Finally, again some years later, the Selective Service System issued, under General Hershey's authorship, a legal manual in which considerable space was assigned to the analysis of various aspects of qualification for CO status. However, the entire discussion on "religious training and belief" is from the angle of belief, with no reference at all to training. In dealing with church membership and church tenets, the manual states that probably too much emphasis is placed on that point; but, again, there is no reference to religious or more specifically church training.¹⁰⁵

¹⁰¹ See Section IV, subsections A & B. The latest revision of the DoD goes so far as to incorporate the pertinent language of LBM 107. This development is subject to all the criticisms reflected in these *Comments*, plus the additional anomaly, noted above, that any claim properly before the military is apt to be of recent and sudden development, and certainly not a direct outgrowth of early experience.—*Ed.*

¹⁰² Religious belief, however, is more

important than "training" because we are too prone to have the schoolmaster in mind and hours, days, weeks, years of study when we weigh the meaning of training. Even there, one gets it by the long process—another by "cramming". Does he get it? That's the question. If so, it involved training of some kind. I have some doubt about absorption through "bolts from the blue" even though I do not toss aside entirely St. Paul's experience on the Road to Damascus. These are exceptions, and probably he had a lifetime of training crammed into that one hour.

Pertinent part of letter from Lewis B. Hershey, Director, Selective Service System, to the Department of Justice, March 5, 1942. Reproduced in CCCO *Handbook for Conscientious Objectors* 86 (9th Ed. 1967).

¹⁰³ Divergent ideas broke sharply over that contention presented in the Congressional language "religious training and beliefs * * *. Many board members held the view that * * * objection must arise from religious training and belief in * * * religious organizations * * *. Hearing officers * * * held generally that the conviction * * * must rest * * * on an easily recognizable background * * *. We adopted a more liberal view * * * to say the conscientious convictions held by a man reared in the environment of a religious civilization and exposed, if only subjectively, to its ethical concepts, have their roots in the same soil from which spring religious convictions * * *.

Hershey, *Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941/42, at 256-58.

¹⁰⁴ United States Selective Service System, Monograph No. 11, *Conscientious Objection* (1950).

¹⁰⁵ *Legal Aspects of Selective Service*, first published 1957. Revised 1963 and 1969. There was no change in the second and third issues with respect to the passages cited.

With respect to a possible relationship between training and sincerity, the manual does list quite a number of facts relating to the claimant's past, which it says the boards may consider in determining whether the registrant is sincere. Significantly, these range from youthful derelictions and hunting of wild game to membership in military organization, family background, etc., but no example has a bearing on training.

This record must be read in the light of General Hershey's statements at the 1967 congressional hearings¹⁰⁶ which stressed his doubts about the possibility of defining "religion". Taken together, these statements may fairly be said to suggest that training comparable to that of a traditional religious objector would not, in General Hershey's view, be an appropriate requirement for moral-ethical conscientious objection.

V. SUMMARY AND CONCLUSION

The arguments and evidence marshalled above serve as formidable support for the contention that there is no basis in logic or settled policy, in legislative history or in judicial authority for a requirement of training in moral-ethical CO beliefs. This requirement of LBM 107 is invalid whether put forward as an independent test of eligibility for exemption, or simply as evidence of sincerity. Congress and the courts have repeatedly and constantly rejected attempts to impose such a requirement, which would be inconsistent with the policy of granting CO status to sincere moral-ethical objectors. Even the Selective Service System shared this view, until Supreme Court decisions raised unjustified fears of administrative breakdown.

Perhaps experience has served to allay these fears, so that the currently pending revisions of the regulatory scheme can abandon the unlawful criteria of LBM 107 voluntarily and gracefully.

Meanwhile, men denied CO status because of those criteria have valid grounds for relief by way of habeas corpus or defense to criminal prosecution.

¹⁰⁶ See n. 61 *supra*.

17. SILARD, BELA, "INVALID DISRUPTION RULES FOR CO ALTERNATIVE
SERVICE"

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INVALID DISRUPTION RULES FOR CO ALTERNATIVE SERVICE *

INTRODUCTION

Under the Military Selective Service Act of 1967,¹ those conscientious objectors (COs) whose beliefs preclude any form of participation, even as non-combatants, in war in any form, are classified I-O and relieved from induction for service in the armed forces. In lieu of military training and service they are required "to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local [draft] board pursuant to Presidential regulations may deem appropriate. . . ."² And the President has de-

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1. Military Selective Service Act of 1967, 50 U.S.C. APP. § 451 *et seq.* (1967) (hereinafter cited as the Act).

2. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the Armed Forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title.

Act § 6(j), 50 U.S.C. APP. § 456(j) (1967).

In addition to this specific authorization with respect to alternative civilian work, § 10 (b) (1), 50 U.S.C. APP. § 461 (1967), gives the President general authority to issue rules and regulations to carry out the provisions of the

fined, in his regulations, such "appropriate" work as (1) any governmental employment, federal or state, and (2) employment with non-profit organizations that are engaged in the improvement of health, welfare, education or science, for public rather than private benefit.³ Selective service law thus maps out a vast field of appropriate work, significantly delineated only by the *nature* of the employer and the character of his program and activities, rather than by any other circumstance pertaining to the job, be that in general, or in its *relationship to the individual* registrant, in particular.

Since the mid-1950s, however, the local boards have seriously restricted the scope of acceptable alternative service in general, and included the requirement of personal hardship into the work orders issued to individual COs. Probably following some, as yet undisclosed, informal instructions from the now-retired Director of Selective Service, Lt. Gen. Lewis B. Hershey, they began also to insist that the conscientious objectors perform menial, low-paid, and otherwise undesirable work.⁴

In the early 1960s, the boards also started to specifically require that the place of employment be far from the registrant's home. Then, in 1968, General Hershey formalized and amplified these restrictive rules in his amendment of Local Board Memorandum (LBM) 64, and he added further restrictions a year later, in his LBM 98. A summary of these restrictive rules is contained in the Appendix. The gravest ones of these tightened restrictions require the "disruption of

3.

1660.1 Definition of Appropriate Civilian Work.—(a) *The types of employment which may be considered under the provisions of section 6(j) of the Military Selective Service Act of 1967, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the Armed Forces by registrants who have been classified in Class I-O shall be limited to the following:*

(1) *Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.*

(2) *Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.*

32 C.F.R. 1660.1(a) (emphasis supplied).

4. Most of these jobs were in hospitals, insane asylums and similar institutions.

the registrant's normal way of life," limit him to jobs undesired by others, prescribe employment so far away from home that he cannot commute, and deny him practically all worthwhile, satisfying jobs in which he could apply his occupational skills.⁵

Nevertheless, few instances have been reported in which conscien-

5.

1. **Appropriate Civilian Work.** Civilian work which is appropriate to be performed in lieu of induction into the Armed Forces by registrants classified in Class I-O should meet the criteria prescribed in section 1660.1 of the Selective Service Regulations. *Whenever possible the work should be performed outside of the community in which the registrant resides.* The position should be one that cannot readily be filled from the available competitive labor force, or from civil service or merit registers of the Federal, State or local governments, and *should constitute a disruption of the registrant's normal way of life somewhat comparable to the disruption of a registrant who is inducted into the Armed Forces.*

Local Board Memorandum 64, para. 1, SSLR 2183 (emphasis supplied).

2. The local board, in carrying out its responsibilities, often faces a difficult task. *Always there must be an effort to see that the path of the conscientious objector in being processed for and performing civilian work parallels as nearly as possible the path of the I-A man in his processing for and performance of military duty. Under this theory, the conscientious objector's pay should be reasonably comparable to the pay, allowances and other benefits received by the man inducted into the Armed Forces: and his assignment should be beyond commuting distance from his home.* The registrant does not have a right to select the work which he is to perform unless the job selected is deemed by the local board to be appropriate for the individual registrant, *even though work selected by the registrant may fall within the definition appearing in the regulations.* Local boards consider work assignments on an individual case basis so that *an assignment to a particular job for one registrant does not bind his local board or other local boards to approve a similar job for another registrant.*

3. *It is not advisable to assign a I-O registrant to a job that is sought after by other qualified people, including those who may have completed military or I-W service. Furthermore, a job which qualifies a registrant for occupational deferment should never be deemed appropriate alternative service, since the registrant would not be reached for I-W service while he was eligible for occupational deferment.*

4. Consideration should be given to *utilization of skills*, as is done in the Armed Forces, when other considerations do not prevent it, but, as in the Armed Forces, *it is not always practicable to assign a man to a job where he will be able to utilize all of his special skills.* Many skilled registrants perform work with such organizations as the Mennonite Central Committee of the International Voluntary Services in jobs that utilize specialized skills, but such work is usually performed overseas among disadvantaged people and for subsistence pay.

tious objectors challenged these restrictions.⁶ Most controversies were, and continue to be, confined to the administrative process where they remain hidden from public view. And none of the early judicial decisions that involved COs' refusals to obey civilian work orders turned on the validity of the restrictions themselves.⁷ Appar-

5. Lists of "approved" employers which are maintained in some States are merely lists of qualified employers who are willing to cooperate in the program of alternative service. The local board is not required to assign a registrant to an employer merely because he appears on such a list, nor is the local board prohibited from assigning a registrant to a qualified employer who is not on the list. The list is advisory to local boards.

LBM 98 paras. 2-5, SSLR, 2200:7 (emphasis supplied).

6. Most of the publications (and some statements by individuals) upon whose guidance COs and their professional and lay counselors traditionally rely, describe the restrictive rules of LBMs 64 and 98 without any indication that their legal validity is questionable. See, e.g., MENNONITE CENTRAL COMMITTEE, A MANUAL OF DRAFT INFORMATION FOR CONSCIENTIOUS OBJECTORS 106A (1970); NATIONAL SERVICE BOARD FOR RELIGIOUS OBJECTORS, CIVILIAN WORK AGENCY LIST (introduction: 1966); NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS, A GUIDE TO ALTERNATIVE SERVICE 1-2 (1970), and MEMO FOR I-W's 1-2 (June 1970); A. TATUM & J. TUCHINSKY, GUIDE TO THE DRAFT 201, 212 (3rd ed. 1970); CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS (CCCO), HANDBOOK FOR CONSCIENTIOUS OBJECTORS 51 (11th ed. 1970); CCCO, DRAFT COUNSELOR'S NEWSLETTER, August, 1970, at 6, and November 1970, at 5; CCCO, DETAILS OF COMPULSORY WORK PROGRAM FOR CONSCIENTIOUS OBJECTORS 5-6, 13; L. ROTHENBERG, THE DRAFT AND YOU 209 (1968). See also an opinion tending to support the hardship rule, by G. E. Shenk, NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS, THE REPORTER FOR CONSCIENCE' SAKE, January, 1970, at 7. But see statements on probable invalidity of these rules, SSLR PRACTICE MANUAL, para. 1130; a written statement of this writer identified only as "an article submitted to the Selective Service Law Reporter" referred to in the oral statement of C. Schoefer before the *Subcommittee On Administrative Practice And Procedure of the Committee On The Judiciary*, United States Senate, 91st Cong., 1st Sess., at 167. The article itself is entitled *Some Examples Of How The Conscientious Objector's Rights Are Denied By Those Who Administer The Draft Law*, reproduced in full at 179-80; statement of A. Neier, Executive Director of the American Civil Liberties Union before the Armed Services Committee, United States Senate, Hearings On The Draft, February 9, 1971.

It is interesting to note that a legal manual of the Selective Service System authored by General Hershey and revised and re-issued from time to time, has never touched upon the disruption principle. Even the most recent issue, LEGAL ASPECTS OF SELECTIVE SERVICE, January 1, 1969 at 45-46, where it points to a long list of varied controversies involving civilian work by conscientious objectors, citing court decisions for each, is bare of all reference to this problem.

7. A large number of cases involved Jehovah's Witnesses who disobeyed work orders on the ground either that their religion prohibited them from obey-

ently, only in three recently reported cases have the COs specifically challenged the validity of the restrictive rules and practices.⁸

A critical analysis of the restrictive rules will demonstrate that they have no basis in the statute, the regulations, or the spirit of the selective service law, and that they are contrary to both long standing national policy and Congressional intent.⁹ Hence, it will be argued

ing the Selective Service System or that they should have been exempted from all service as ministers of religion. Other cases involved a registrant who challenged his assignment to a private employer, *United States v. Copeland*, 126 F. Supp. 734 (D. Conn. 1954); registrants who objected to work in hospitals administered by religious bodies other than their own, *United States v. Crouch*, 415 F.2d 425 (5th Cir. 1969); registrants who claimed irregularities in their processing for work, *United States v. Neill*, 248 F.2d 383 (7th Cir. 1957), *United States v. Coon*, 153 F. Supp. 96 (D. Utah 1957); and a registrant who requested work not included within the Presidential specifications, *Jessen v. United States*, 242 F.2d 213 (10th Cir. 1957). Cases have also involved the use of the State Selective Service Director's approved work list to narrow the scope of acceptable employment, *Mang v. United States*, 339 F.2d 369 (9th Cir. 1964), *United States v. Lawson*, 337 F.2d 800 (3rd Cir. 1964), *cert. denied*, 380 U.S. 919 (1965); and the Constitutional question of involuntary servitude, *United States v. Berrier*, ___ F.2d ___ (4th Cir. 1970), *United States v. Hoepker*, 223 F.2d 921 (7th Cir.), *cert. denied*, 350 U.S. 841 (1955).

8. In *Hackney v. Hershey*, ___ F. Supp. ___ (M.D.N.C. 1970), 3 SSLR 3135, a conscientious objector who lived in New York City sought relief from his local board's order to abandon his job at the New York University Medical Center and to accept employment in North Carolina. The local board declared that it was not satisfied with the New York job "because this would not disrupt registrant's way of life." In refusing to issue an injunction or a declaratory judgment that LBM 64 was unconstitutional the court found that the challenged disruption came within the local board's "reasonable control" of the registrant, since the Selective Service Act specifically provides that the COs work shall be performed "as the local board pursuant to Presidential regulations may deem appropriate." The case is now before the Fourth Circuit on appeal.

In *Burton v. United States*, 402 F.2d 536 (9th Cir. 1968), the court quoted with approval the local board's statement that it did not "recognize all jobs working for the government as fulfilling [the registrant's] service obligation." But Judge Ely in dissent pointed with disapproval to the board's statement that "it was immaterial that the work chosen [by the registrant] was in the public interest, the crucial factor was that it was not on the State Director's list of approved places of employment."

In *United States v. Chaudron*, 425 F.2d 605 (8th Cir. 1970) the registrant sought to remain in a job which appeared to come within the Presidential specifications for being in the "national interest." The court did not deal with the merits of the issue, but simply quoted with apparent approval the Deputy State Director: "[I]t is not the practice of the local boards to order registrants to report for civilian work in lieu of induction into the same work assignments which they may have previously held. . . ."

9. Specifically, the author intends to show that the invalid restrictions render the local boards' disruptive work assignments unlawful, trap registrants who are unaware of the restrictive rules into involuntary servitude, intimidate

that a CO's conviction for refusal to obey his draft board's work order can have no lawful basis where the work order is legally defective by the application of such restrictions and where the registrant has previously expressed his willingness to perform other available work which fully satisfied the requirements of the selective service law. It will also be argued that injunctive relief should be available from such a legally defective work order that has already issued, irrespective of whether the CO has obeyed or disobeyed it, and even before issuance from an impending order.

I. THE SCHEME OF THE STATUTE AND OF THE PRESIDENTIAL REGULATIONS

A. *National Policy.*

For a correct appreciation of the national policy on alternative service as it developed in the course of time, and for showing how General Hershey's disruption principle is utterly contrary to that policy, it is necessary to go back some 100 years in our history and to examine all draft laws enacted since. It will be seen how that history of national policy reflects, with minor and inconsequential variations at one time or another, a continuing attitude of great respect for the CO. Naturally, such an attitude of respect is infertile ground for statutory or administrative schemes that inflict disruption and hardship gratuitously. Where burdens, hardships and even disruption of lives did exist in fact, these were no more than what was unavoidable in the specific circumstances under which work in the national interest necessarily had to be performed. It will be seen that nowhere could there be found intentional creation, by governmental rule, of disruption for disruption's or hardship for hardship's sake.

In Colonial times, and extending until after the Revolution, there was compulsory service in the militias of the individual colonies, the later states. But alternative service was not yet conceived; and all those recognized to be conscientiously opposed to bearing arms were relieved from all service. During the Civil War, the conscription law of the Union required that the Secretary of War assign COs "to duty in the hospitals or to the care of freedmen."¹⁰ By such assignment, the COs were in fact performing civilian service obligation from which they could free themselves only by payment of a sum of \$300.

those who are aware of the restrictions into subordinating their moral convictions by chilling their free exercise of rights assured them by law, and inflict impermissible administrative punishment. See sections III.A and III.B *infra*.

10. Act of Feb. 24, 1864, ch. 13, § 17, 38 Stat. 9.

During World War I conscientious objectors were inducted into the armed forces and assigned to non-combatant duties. COs were exempt from military service during World War II, but they were compelled to work without pay in civilian labor camps operated by pacifist religious organizations. The work itself was strictly regimented manual labor, and the statutory requirement for "civilian supervision" was sometimes violated. Many COs deserted the camps, and some were subsequently prosecuted and convicted.¹¹

The 1940 Draft Act, in effect throughout World War II, expired in May 1946, and there was no conscription statute at all for two years. When the 1948 law was enacted it required that conscientious objectors be "deferred" but provided no alternative service obligation.¹²

Then in 1951, during the Korean War, an amendment to the 1948 Act reinstated the alternative service obligation, but individual civilian employment replaced the compulsory work camp assignments of World War II.¹³ The hearings in the House and Senate Armed Services Committees, the reports, and the debates on the floor of both Houses, particularly of the Senate, make it entirely clear that thought of real hardship, let alone an artificially created one, had not entered the minds of the legislators. In fact, some of them expressed special concern (and received prompt assurance) about forthcoming administrative arrangements that would make the assignment of COs free from humiliation and free from hardship to their families, would make maximum use of their capacities, would not limit them to hospital work, and possibly would assure them payments from the government to supplement occasional especially low pay earned in their employment.¹⁴

The 1967 Act continued the 1951 scheme in all its essentials.¹⁵ A

11. See L. WITTNER, *REBELS AGAINST WAR, THE AMERICAN PEACE MOVEMENT, 1941-1960* at 70 *et seq.*, for a detailed description and abundant documentation of the controversies involving the World War II camps.

12. Selective Service Act of 1948, P. L. 759, 80th Cong., 1st Sess. (1948). The pertinent part of § 6(j) read "shall if he is found to be conscientiously opposed to participation in such non-combatant service be deferred."

13. The words "be deferred" were replaced by the following:
in lieu of such induction, be ordered by the local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b), such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate.
Universal Military Training and Service Act, P. L. 51, 82d Cong., 1st Sess. (1951).

14. *Hearings on S. 1 Before the Senate Comm. on Armed Services*, 82d Cong., 1st Sess. (1951); 97 CONG. REC. 1989-1992 (1951) (exchange between Senator Saltonstall and Senator Douglas).

15. But see notes 20-21 *infra* and accompanying text.

survey of the Congressional Committees' Hearings and their reports reveals no intent for a change and no suggestion whatsoever with respect to inflicting hardships on working COs.¹⁶ In fact, the only proposed amendment which could have meant hardship by proposing that COs be inducted into the armed forces and immediately furloughed to perform civilian work, would have placed them under military jurisdiction. It was rejected even before it could have reached the floor of the House.¹⁷ The absence of any discussion in Congress, leading to the passage of the 1967 Act, with respect to the COs' civilian work is significant for yet another reason. (An exception is a statement by General Hershey that must be interpreted as part of his disruption scheme¹⁸ and which did not draw any comment from committee members.) It must be noted that both in the House and Senate Committees the discussions on the qualifications for CO classification were most extensive and exceedingly intensive. Scores of pages of the transcripts are filled with debate about the *nature* of conscientious objection, without a single word said about restrictions on the choice of civilian work. It is fair to say that congressional concern, reflected in these hearings, was the traditional attitude of respect for the beliefs and dedication of the conscientious objector whose convictions bar him from military service.¹⁹

16. *Hearings on the Review of the Administration and Operation of the Selective Service System before the House Committee on Armed Services*, 89th Cong., 2d Sess., Report No. 75 (1966) (hereinafter cited as 1966 *House Committee Hearings*) and the interim report thereon, H.R. No. 76 (1966); *Hearings on the Extension of the Universal Military Training and Service Act before the House Committee on Armed Services*, 90th Cong., 1st Sess., Report No. 12 (1967) (hereinafter cited as 1967 *House Committee Hearings*); *Hearings on S. 1432 on Amending and Extending the Draft Law and Related Authorities before the Senate Committee on Armed Services*, 90th Cong., 1st Sess. (1967) (hereinafter cited as 1967 *Senate Committee Hearings*); *Conference Report on Amending and Extending the Draft Act and Related Laws*, 90th Cong., 1st Sess., Report No. 346 (1967).

17. See discussion in Hershey, *What Is A Registrant?* SELECTIVE SERVICE NEWS, February 1970 at 2.

18. General Hershey's comment, "[W]e always had a problem with the conscientious objectors, to try to keep them doing something that would not be too attractive," failed to evoke any comment from the committee members present. 1966 *House Committee Hearings* at 9702.

19. 1966 *House Committee Hearings* at 9719; 1967 *House Committee Hearings* at 2574, 2639; 1967 *Senate Committee Hearings* at 21, 34-35, 242, 294, 351, 354.

This attitude of respect is demonstrated in the military regulations governing the assignment of COs to non-combatant duties within the service, or, if their conscientious objection extends to all forms of military service, their discharge in favor of alternative civilian service. Department of Defense Directive 1300.6, Air Force Regulation 35-24, Navy Manual 1860120. Consideration rather than hostility is also demonstrated in the information supplied by the gov-

B. *The Statute*

The Selective Service's "disruption" rules and the local boards' adherence to them find no more support in the language of the current Act than they do in the evolution of national policy toward alternative service. Section 6(j) of the 1948 Draft Law, as amended in 1951, required that COs be *ordered* to perform their alternative civilian service "subject" to Presidential regulations, but it did *not* refer to Presidential regulations in connection with the local boards' *determination* as to what work would be deemed appropriate.²⁰ When the 1967 law re-enacted section 6(j), however, it inserted the words "pursuant to Presidential regulations" in the phrase controlling the local board's designation of "appropriate" work. Thus, the

ernment to military chaplains, who conduct the first official interviews of servicemen seeking formal recognition of their asserted status as conscientious objectors, and who act as counselors to such men at all times. The Army Chaplains' Manual, for example, asserts that "granting an individual the privilege of conscientious refusal to serve in war . . . may have a value to American society that far outweighs any potential risk to its safety." United States Army Chaplain School, Fort Hamilton, New York, Manual ST16-60-1, Counseling the Conscientious Objector at 1-2. And the Solicitor General of the United States has stated:

The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of God. . . . The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the nation.

United States v. Seeger, 380 U.S. 163 (1965), brief for the government at 35. The Solicitor General has also compiled . . .

a careful history of the uniform and unbroken Congressional history of intent to respect refusal of military service when it is based upon obedience by an individual to the commands or laws of God as he understands them under his religion.

Negre v. Larsen, 418 F.2d 908 (9th Cir. 1969), *cert. granted*, No. 325 (S. Ct. Oct. Term 1970), petitioner's brief at 24.

See generally L. SCHLISSEL (ed.), CONSCIENCE IN AMERICA, A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTION IN AMERICA 1757-1967, Part III, documents 12-15, and Part IV, document 28 (1968); E. WRIGHT, CONSCIENTIOUS OBJECTION IN THE CIVIL WAR (1966).

20. The Presidential regulations, both with respect to the ordering of registrants to civilian work and the definition of appropriate work, were issued under Executive Order No. 10328 in 1952. R1660.1(a), containing the *definition* of appropriate work, has remained unchanged since then. See note 3 *supra*. Only R1660.20(a), describing the *procedure* for selecting work, was amended in January 1962, by Executive Order No. 10984 but only in an inconsequential respect. The word "qualified" replaced the word "acceptable" in the first sentence, and a reference to DD Form 62 (on which physical qualification is certified) was added.

present section 6(j) refers to "such civilian work . . . as the local board *pursuant to Presidential regulations* may deem appropriate."²¹

None of the 1966 and 1967 hearings of the Armed Services Committees, their reports, the floor debates, or the Conference Report discusses this change of language. Hence, it must be assumed that the insertion was not intended to effect an actual change in the provision. More likely, it was intended to clarify something which was not thought to have been sufficiently clear in the earlier statutory language. In this context General Hershey's LBM 98 asserts that the Presidential specifications of appropriate civilian work set only an outside limitation *beyond* which the boards may not assign a registrant to work, but *within* which they are free to exercise their discretion and set narrower standards.²² This interpretation implies that

21. One important consequence of this change is that the earlier cases, note 7 *supra*, nearly all of which were decided adversely to the registrant, are now distinguishable, at least to the extent that they relied upon the 1948 Act's provision as amended in 1951 regarding what the local board is to deem appropriate. In *United States v. Lawson*, for example, the court declared:

The Selective Service Act clearly prescribes that the employment shall be that which the *local board deems appropriate* when it stated (sic!): . . . shall . . . be ordered . . . to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board *may deem appropriate*. . . .

337 F.2d 800, 816 n. 26 (3rd Cir. 1964), *cert. denied*, 380 U.S. 919 (1964).

In *Burton v. United States*, *supra* note 8, the local board's statement that it did not recognize every form of governmental employment as fulfilling the alternative service obligation was made in August 1966, *i.e.*, before passage of the 1967 Act. The decision, entered in October 1968, quotes the board's statement with approval and continues:

The law and regulations do not require offered employment to be accepted by the board simply because the employer is the government. 32 C.F.R. 1660.1(a) (1) provides that such work "*may be considered*" to be civilian work "contributing to the maintenance of the national *health, safety, or interest* and appropriate to be performed in lieu of induction."

402 F.2d 536, 540 (9th Cir. 1968). While the court referred to "the law" it neither cited it nor quoted from it. Hence, it is impossible to ascertain whether the court considered the statute as it read before or after the 1967 amendment. But even if the court did consider the amended statute it might still have viewed the amendment itself as inconsequential, either because of the court's own interpretation of the word "may," which it quoted from the regulations with emphasis, or because the local board took action on *Burton's* request before 1967.

22. The selective service law provides that I-O registrants shall, in lieu of induction into the Armed Forces, be ordered to perform such civilian work contributing to the maintenance of the national health, safety or interest as the local board pursuant to Presidential regulations may deem appropriate. *The Presidential regulations define appropriate civilian work* as being limited to employment by

the insertion of the words "pursuant to Presidential regulations" was provoked by local board assignments *outside* the Presidential limitations. But such assignments were *never* permitted and never made. On the contrary, the local boards had already adopted a wide variety of restrictive rules and practices before the 1967 Act was under consideration.²³ Thus, a more plausible interpretation is that the inserted words intended to establish a *statutory command* for local board obedience to the pre-existing Presidential regulations. And this command can only mean that the local boards may *not* apply their own judgment as to what type of work accords with the statute, but must make their determinations "pursuant to," *i.e.* by applying nothing but the Presidential regulations.

This limitation of the local board's discretion does not render its determination of appropriate work a meaningless or unnecessary procedure. On the contrary, the Presidential specifications were never intended to and in fact do not constitute an enumerative list of appropriate employers. They are purely definitional. The local boards, therefore, are still called upon to determine whether the type of work to be performed by a registrant is in fact governmental employment or work for an organization which is in fact non-profit and whose activities are in fact in the public interest as defined by the Presidential regulations.

C. The Presidential Regulations and SSS Form 152

In full conformity with the statutory scheme, the Presidential regulations neither authorize nor impliedly permit the local boards to narrow the Presidential specifications of appropriate work in the national interest. Regulation R1660.1(a) begins, "The types of employment which may be considered . . . to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed . . . shall be limited to the following: . . ."²⁴ And R1660.20 describes a process in which the regis-

the Government, or by certain nonprofit organizations, *but this does not require the local board to approve every job that may fall within these broad guidelines. There are many jobs that would fall within the definition prescribed in these regulations that would never be deemed appropriate as alternative service by a local board. The regulations merely restrict the board by prohibiting work assignments that are not included.*

LBM 98, para. 1, SSLR 2200:7 (emphasis supplied).

23. See note 4 *supra* and accompanying text.

24. See note 3 *supra*.

trant initially proposes three types of work for the local board's consideration.²⁵ Since he may happen to offer to perform work not included within the Presidential specifications, R1660.1 is no more than an instruction to the board not to accept such an offer. There is little reason to believe that the word "may" in the phrase "may be considered" licenses the local board to disregard the Presidential standards in favor of some narrower standard of its own or of the Selective Service Director's invention.²⁶

It is also reasonably clear in R1660.1(a) that appropriateness and national interest are linked together in one indivisible command, even though the words "and appropriate," rather than "and therefore appropriate," are used to link the two together. Both terms are defined by the types of employment specified in subsections (1) and (2). Hence, a local board should have no more discretion to declare a type of work conforming to the Presidential specifications "inappropriate" than it would to deny that such work is in fact in the national interest.²⁷

The regulatory scheme is further expressed in the title of R1660.20: Determination of Type of Civilian Work To Be Performed and Order by the Local Board to Perform Such Work. The phrase "type of work," used throughout the regulatory scheme, and the

25.

1660.20 Determination of Type of Civilian Work To Be Performed and Order by the Local Board to Perform Such Work.—(a) When a registrant in Class I-O has been found qualified for service in the Armed Forces after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after a Statement of Acceptability (DD Form 62) has been mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the Armed Forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

32 C.F.R. 1660.20(a), SSLR 2143 (emphasis supplied).

26. But see the discussion of *Burton* in note 21 *supra*.

27. In line with these interpretations it is probable that the words "shall be limited to" merely duplicate the word "may" for further emphasis. Thus, there would have been no change in meaning if either of these terms had been deleted from R1660.1(a) and reliance had been placed solely upon the other.

complete absence of such terms as "job, assignment, employment," or even simply "work," indicates that what the registrant is to "offer," what the board is to "submit" to him, what they must "agree" upon, and what the board must find "appropriate" is the "type" of work, rather than a specific job in a designated place with a particular salary.²⁸

28. There are only three instances in R1660.20 where the word "work" is not preceded by the word "type." In R1660.20(b) the term "such work" is merely a reference to the phrase "types of work" in the preceding clause. In R1660.20(c) "work" refers to a specific agreement between the board and the registrant, perhaps identifying a particular job. This, however, is not a unilateral assignment by the board. In R1660.20(d) the board is instructed to "order the registrant to report for civilian work" if no agreement upon a "type of civilian work" can be reached. Obviously, the board could not issue an actual work order specifying only a type of work. It must first ascertain that a specific job is in fact available.

(b) If the registrant fails to submit to the local board *types of work* which he offers to perform, or if the local board finds that none of the *types of work* submitted by the registrant is *appropriate*, the local board shall submit to the registrant by letter three *types of civilian work* contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the *types of work* submitted by the board, or that he does not offer to perform any of *such types of work*. If the registrant offers to perform any one of the three *types of work*, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(c) If the local board and the registrant are unable to agree upon a *type of civilian work* which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to *perform work* in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree

The only Presidential regulation which does qualify the general rule regarding appropriate work is R1660.21(a), which provides: No registrant shall be ordered by the local board to perform civilian work in lieu of induction in the community in which he resides unless in a particular case the local board deems the performance by the registrant of such work in the registrant's home community to be desirable in the national interest.

It is probable that an erroneous interpretation of this regulation encouraged the Director to assert that a CO's work should be performed "outside of the community"²⁹ and that it "should be beyond commuting distance from his home."³⁰ While it is grammatically possible to interpret the regulation as applying to a situation where the registrant *himself seeks* an assignment in his home community, the use of the word "ordered" rather than a term such as "permitted" makes a different interpretation more plausible. A clearly discernible public policy seeks to shield the registrant from disdain and humiliation by his home community if he does menial work.³¹ Therefore, R1660.21(a) must be assumed to have been intended to *prevent* the local boards from *assigning* COs to work in their home communities *against their will*, unless such assignments are "in a particular case . . . desirable in the national interest."³² Moreover, "outside the home community" does not establish any standard for a minimum distance between the community and the working place, let alone one so great that it bars commuting and thereby forces the CO to live away from home.

The preceding discussion has attempted to show the essentially

upon a *type of civilian work* which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, *shall order the registrant to report for civilian work* contributing to the maintenance of the national health, safety, or interest *as defined in section 1660.1* which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

32 C.F.R. 1660.20(b)-(d), SSLR 2143 (emphasis supplied).

29. LBM 64, para. 1, *supra* note 5.

30. LBM 98, para. 2, *id.*

31. See note 14 *supra*.

32. The publications enumerated in note 6 *supra*, either ignore the problem of interpretation of R1660.21(a) or accept the government's version. But in oral argument before the Fourth Circuit appellant's counsel in *Hackney v. Hershey*, note 8 *supra*, argued, without opposition from the U.S. Attorney, that the interpretation urged here is the correct one (personal communication from counsel).

permissive nature, even though within well-defined broad limits, of the regulatory scheme and the absence of any lawful basis for the Director's "disruption" rules. It is interesting to note that the standard form used by the Selective Service System to process alternative service assignments fully support this interpretation. SSS Form 152, which the registrant fills out when he offers to perform three types of work pursuant to R1660.20(a), uses the phrase "types of work" throughout, in endless repetition.³³ The word "work" is used alone only to refer to a board order issued when no agreement with the registrant can be reached.³⁴ And in such cases the board must have

33. It is significant that the use of SSS Form 152 has never been prescribed in R1660.20(a). This is contrary to general practice with respect to forms promulgated by the President in connection with the regulations. R1660.20(a) does refer, since the 1962 amendment of the regulation, to DD Form 62, for example. See note 20 *supra*. This supports the view that SSS Form 152 was actually issued by the Director. If so, it is convincing evidence that in earlier years the Director did go along with the properly interpreted statutory and regulatory scheme.

34.

To Class I-O Registrants:

A registrant placed in Class I-O who has received his Certificate of Acceptability (DD Form 62) or who failed to report for or submit to Armed Forces physical examination shall, in accordance with Selective Service Regulations prescribed by the President, be ordered by his local board to perform for a period of twenty-four (24) consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate.

The Selective Service Regulations require you to submit to your local board, within ten (10) days after a Certificate of Acceptability (DD Form 62) is mailed to you or within ten (10) days after you have filed to report for or submit to an Armed Forces physical examination, three (3) types of approved civilian work which you are qualified to perform and which you offer to perform in lieu of induction into the Armed Forces. A list of the types of approved civilian work is on file in local board offices. The types of work you offer to perform, your prior work experience, and your other pertinent qualifications should be set forth under the appropriate items of this form.

If you fail to submit to the local board the types of work which you offer to perform, or if the local board finds that none of the types of work submitted by you has been approved, or is appropriate, it will submit to you by letter three (3) types of approved work which it deems appropriate for you to perform. Within ten (10) days after such letter has been mailed to you by the local board, you shall file with the local board a written statement signifying acceptance or rejection of any or all of the types of work submitted. If any types are acceptable to you the local board will order

found a specific job actually available in a specific place. Otherwise the work order would be without effect.

you to perform one of the types of work which you have offered to perform. If you do not offer to perform any of the types of work submitted by the local board, a meeting will be held at a time and place of which you will be mailed notice and at which you will have an opportunity to reach an agreement with the local board as to the type of work which you will perform. If no agreement can be reached at such meeting the local board, after approval by the Director of Selective Service, will order you to perform such work as is deemed appropriate by the local board.

In no case will you be required to perform work until you have been mailed and Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This order will allow you a minimum of ten (10) days after the date on which it is mailed to you to report for work. However, your local board will not order you to work prior to the time you would have been ordered to report for induction if you had not been classified in Class I-O unless you file with the local board an Application of Volunteer for Civilian Work (SSS Form 151) which establishes that you desire to be ordered to work as soon as possible without regard to your normal order of selection.

By submitting a choice of employment you have an opportunity to select the type of work you will be more interested in and perhaps best qualified to do. There may be opportunities for performing approved types of work with nonprofit organizations, associations, or corporations or with local, State, or Federal governmental agencies. If you are qualified for positions that require special skills, training, technical knowledge, or professional education and experience, you should list any additional information that will be of assistance to the employer in assigning you to work that can utilize your highest level of aptitude and skill.

In the event you have applied to one of the approved employers for work and have a definite answer to your application, you should show this in Series II on the form. The local board cannot secure special skilled positions for you. *However, it will be the policy of the Selective Service System whenever possible to order you to civilian work which will most fully utilize your experience, education and training.*

The Universal Military Training and Service Act, as amended, provides that any person who knowingly fails or neglects to obey an order from his local board to perform civilian work, as required by section 6(j) thereof, shall be deemed to have violated the provisions of the Universal Military Training and Service Act, as amended, and shall be subject to the punishment provided by that act.

.....
(Clerk or member of local board)

The requirements of Series I, II and III of SSS Form 152 are, if possible, even more persuasive. Series I makes the registrant state that he is qualified to perform the types of work which he offers,³⁵ and Series II clearly contemplates the possibility that the board might approve a job which the registrant has already secured.³⁶ The registrant could hardly be expected to offer to perform, or to secure on his own initiative, work which disrupts his life. Series III requires the registrant to describe his civilian work experience, skills, inter-

35.

SERIES I—WORK QUALIFICATIONS

In accordance with Selective Service Regulations I am submitting in order of preference, three (3) types of approved civilian work, selected from a list on file at a selective service local board, which I am qualified to do and which I offer to perform in lieu of induction into the Armed Forces as follows:

1. First Type:
2. Second Type:
3. Third Type:

SSS Form 152, p. 2, SSLR 2156:16.

36.

SERIES II—APPLICATION FOR APPROVED EMPLOYMENT

If you have applied to an approved employer for civilian work contributing to the national health, safety, or interest, and he has accepted your application, indicate:

Name of employer
 Address of employer
 Type of employment
 Remarks

(signature of registrant)

Fill out work experience record on opposite side.

SSS Form 152, p. 2, SSLR 2156:16.

In January 1971 the present Director issued a brochure for general distribution entitled "C.O.," which urges the registrant who has been classified I-O "to begin looking for a suitable job as soon as possible."

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ests, and even hobbies.³⁷ This provides support for the view that consideration of the CO's inclinations and utilization of his skills are established policies of the regulatory scheme. In fact, as late as 1968, SSS Form 152 contained the following sentence: "However, it will be the policy of the Selective Service System whenever possible to order you to civilian work which will most fully utilize your experience, education and training."³⁸ This sentence was dropped without explanation from the 1969 printing, the first one to follow the introduction of the disruption rules in the Director's 1968 amendment of LBM 64.

37.

SERIES III—IMPORTANT CIVILIAN WORK EXPERIENCE

1. Describe your longest and most important jobs—Begin with your most recent job

A. Name of Employer:				Name job and describe exactly what you did and how you did it:			
Address							
Employer's business							
DATE JOB STARTED	DATE JOB ENDED	FINAL PAY PER WK					
B. Name of Employer:				Name job and describe exactly what you did and how you did it:			
Address							
Employer's business							
DATE JOB STARTED	DATE JOB ENDED	FINAL PAY PER WK					
C. Name of Employer:				Name job and describe exactly what you did and how you did it:			
Address							
Employer's business							
DATE JOB STARTED	DATE JOB ENDED	FINAL PAY PER WK					
D. Name of Employer:				Name job and describe exactly what you did and how you did it:			
Address							
Employer's business							
DATE JOB STARTED	DATE JOB ENDED	FINAL PAY PER WK					

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2. ABILITIES AND INTERESTS

SPECIAL SKILLS (Check those in which you have experience)

.....Accounting	.....Child Welfare	.....Electricity	.....Animal Husbandry
.....Bookkeeping	.....Handicrafts	.....Mechanics	.....Fruit Growing
.....Filing	.....Playground Supervision	.....Plumbing	.....Gardening
.....Shorthand	.....Group Singing	.....Licensed Car Driver	.....Cooking
.....Typing	.....Painting	.....Licensed Truck Driver	.....Sewing
.....Nursing	.....Masonry	.....Dairying	.....Laundry
.....Teaching	.....Carpentry	.....Poultry Farming	.....Other (Describe below)

Other

Describe training, experience, and degree of proficiency in the skills in which you are most interested.

List any special hobbies or interests you may have

3. LANGUAGES, other than English (check appropriate space) S-speak; R-read; W-write:

	Spanish			French			German			Low German			Other					
	S	R	W	S	R	W	S	R	W	S	R	W	()	()	()	()	()	()
Fairly well																		
Fluently																		

3

SSS Form I 152, p. 3, SSLR 2156:16.

38. See note 34 *supra*.

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Finally, and perhaps most importantly, there is ample authority from three relatively recent Supreme Court decisions³⁹ for the invalidity of any local board procedure, even if it is specifically authorized by Presidential regulation, where the statute provided neither standards nor definitions for the principle to be applied in such procedure. In these decisions the Court invalidated the Presidential delinquency regulation even though the statute expressly mandates that "delinquents" be placed first in the order of call, on the ground that the statute fails to provide the principles to be followed in establishing delinquency.⁴⁰ Thus, assuming, *arguendo*, that there was legislative intent to permit the boards to narrow the Presidential specifications for civilian work, and that R1660.1(a) is intended to confer on the boards power to do so at their discretion, the complete lack of statutory definitions, standards, or guidelines for the exercise of such discretion prohibits the latter.

II. THE DIRECTOR AND HIS RULES

A. Source of the Director's Authority

The Selective Service Act authorizes the President "to prescribe the necessary rules and regulations to carry out the provisions of [the

39. *Oestereich v. Selective Service System*, 393 U.S. 233 (1968); *Gutknecht v. United States*, 396 U.S. 295 (1970); *Breen v. Selective Service System Local Board No. 16*, 396 U.S. 460 (1970).

40. In *Oestereich*, note 39 *supra*, the Court held with respect to the delinquency regulations, Part 1642:

Congress has . . . made criminal the knowing failure or neglect to perform any duty prescribed by the rules or regulations of the Selective Service System. 50 U.S.C. APP. § 462 (a). But Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System Serious questions would arise if Congress were silent and *did not prescribe standards* to govern the Board's actions. . . . So to hold would make the boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

393 U.S. at 237. *See also* Justice Harlan's opinion concurring in the result: "I do not understand [the language of section 10(b)(3) of the Act] to prohibit review of a claim . . . that the very statute or *regulations* which the board administers are *facially invalid*." *Id.* at 240 (emphasis supplied).

In *Breen v. Selective Service System Local Board No. 16*, note 39 *supra*, the Court said: "There is nothing in the language of the Act itself which indicates a Congressional desire to allow the President to *add or to subtract from the factors specified* in the statute for determining when students should be deferred. 396 U.S. at 464 (emphasis supplied).

Act]"⁴¹ and "to delegate any authority vested in him under [the Act]."⁴² Since nothing in the statute confers any authority directly upon the Director,⁴³ his powers are necessarily limited to those specifically delegated to him by the President. Thus, the validity of the Director's rules depends upon whether he has acted within the framework of power delegated to him by Presidential regulations, and the President's own authority to issue such regulations, absent which he could not delegate them.

First, it is important to remember that nothing in the statute assigns power to make decisions with respect to alternative service of an individual CO, to any agent except the local board.⁴⁴ And even if the language of R1660.1(a) or R1660.20 did purport to give the boards discretion to narrow the Presidential specifications, the statute has given the Director no role in which he would be permitted to supply the local boards with principles upon which the latter are

In *Gutknecht v. United States*, note 39 *supra*, the Court stated: "There is nothing to indicate that Congress authorized the Selective Service System to re-classify exempt and deferred registrants for *punitive purposes* and to provide for *accelerated induction*." 396 U.S. at 302 (emphasis supplied). It will be noted that here the Court dealt with a processing action rather than a classification action of the local board. Both accelerated induction and assignment to civilian work are processing actions.

41. Act § 10(b)(1), 50 U.S.C. APP. § 461(b)(1) (Supp. 1968).

42. *Id.* § 10(c), 50 U.S.C. APP. § 461(c) (Supp. 1968).

43. § 10(a)(1) does no more than establish the position of Director; § 10(a)(3) provides for his appointment by the President and fixes his salary; § 10(g) defines the Director's duty to make annual reports to Congress.

44. But even if § 6(j) of the Act and R1660.1(a) could be interpreted to allow the boards to set their own narrow standards for "appropriate" work within the Presidential guidelines, they would still have no right to share their authority with the State Directors or the National Director. § 6(j) refers only to the local boards, and § 10(b)(3) provides that "the local boards . . . have the power . . . to hear and determine . . . all questions or claims with respect to inclusion for or exemption or deferment from, training and service under this title." Thus, R1660.20(c), which injects the State Director or his representative into the personal negotiations between the registrant and his board in an attempt to reach an agreement, is a questionable regulation. Similarly, R1660.20(d), providing that the board's order must be submitted to the National Director for approval when no agreement can be reached at the R1660.20(c) meeting, appears to have no basis whatever in the statute. LBM 98, para. 6, closely follows these dubious regulations:

6. Presidential regulations establish a procedure designed to provide opportunity for the local board and the registrant to agree upon appropriate work. Where agreement cannot be reached, regulations require a meeting at which a representative of the State Director assists in an effort to reach agreement. If this fails, the local board designates appropriate work, but cannot issue an order to report until there has been approval by the National Director.

to formulate their decisions in the exercise of such discretion given them by the President.⁴⁵

Second, it must be noted that the President has *not* delegated all of his rule-making authority to the Director. He has conferred upon the Director only as much authority as he needs to issue what are generally considered and termed "housekeeping rules."⁴⁶ Hence, the Director has no power to issue rules with a substantial effect on the registrant's rights and obligations, even if such rules are in accordance with the Presidential regulations.⁴⁷ This was openly conceded recently by the present Director, Dr. Curtis W. Tarr, who asserted that substantive rules, even with respect to "small details," can be promulgated only by the President, and that the administrators of the Selective Service System "do not at this time have the authority to write [their] own regulations."⁴⁸

In line with this concession, the government has attempted from time to time to convince the courts that the LBMs are merely "suggestions and advice." General Hershey has even described them as

45. The President's "delinquency" regulations, 32 C.F.R. 1642, were struck down in their entirety under similar circumstances. *Oestereich v. Selective Service System*, 393 U.S. 233 (1968). See also notes 39-40 *supra*.

46. R1604.1(a) authorizes the Director "to prescribe such rules and regulations as he shall deem necessary for the *administration* of the Selective Service System, the conduct of its officers and employees, the distribution and performance of its business, and custody, use and preservation of its records, papers and property." R1604.1(b) authorizes the Director "to issue such public notices, orders, and instructions as shall be necessary for carrying out the *functions* of the Selective Service System" (emphasis added). See generally SSLR Practice Manual para. 31-33. According to Senator Cranston,

The Selective Service Director's authority to issue policy letters interpreting Selective Service Regulations should be carefully circumscribed to preclude abuses which have the effect of altering those regulations.

Statement before Senate Judiciary Subcommittee, *supra* note 6 at 277.

47. *National Student Assoc., Inc. v. Hershey*, 412 F.2d 1103 (D.C.C. 1969).

48. One of our difficulties is that we do not at this time have the authorization from the President to write our own regulations. And we are trying very hard to get this. There are many things in our regulations, small details we would like to have initiative to change. At the present time we have to go through the procedure of an executive order which is not that easy an arrangement.

Hearings on Review of the Administration and Operation of the Draft Law before the Special Subcommittee on the Draft of the Committee on Armed Services, House of Representatives, 91st Cong., 2d Sess. Report H.A.S.C. 91-80 (1970) at 12550. (Hearings in Executive Session July-November 1970, released and published January 11, 1971).

"just one man's opinion."⁴⁹ But the LBMs which do contain substantive rules use mandatory terms such as "must, shall, will" and "should," rather than the permissive terms such as "is recommended" and "may consider" which are employed in other rules not intended to be mandatory. This language, together with the local boards' pervasive, almost uniform, practice of viewing the LBMs as binding rules, betrays the fallacy in the government's disclaimer.⁵⁰

B. Exercise of the Director's Authority

1. The Metamorphosis of LBM 64

While the Director's rules have always influenced local board actions, the use of that influence to subvert the statute and the regulations by requiring disruption of the conscientious objector's life is a more recent development. Paragraphs 4-7 of LBM 64, which have been in effect since 1962, scrupulously adhere to the properly interpreted statutory and regulatory scheme of the selective service law. Having been promulgated by General Hershey six years before his amendments to LBM 64 introduced the disruption rules, they betray the inconsistency in his evolving position.

Paragraphs 4 and 5 continually refer to "type of work," rather than a particular job.⁵¹ Even when no agreement with the registrant

49. The New York Times, Nov. 9, 1967, at 2, col. 5. Cf. *id.*, Nov. 8, 1967, at 1, col. 2.

50. See Silard, *Some Comments On The LBM 41 Pre-Classification Interview*, 2 SSLR 4001 (1969), particularly footnotes 7-8 and accompanying text. Since the publication of that article, all reported court decisions that involved LBMs, recognized mandatory nature implicitly if not explicitly. See *United States v. Stout*, 412 F.2d 1190 (4th Cir. 1969); *Mizrahi v. United States*, 409 F.2d 1219 (9th Cir. 1969); *United States v. Davis*, 413 F.2d 148 (4th Cir. 1969); *United States v. Enslow*, 426 F.2d 544 (9th Cir. 1970); *National Student Association, Inc. v. Hershey*, 412 F.2d 1103 (D.C.C. 1969).

51.

4. Determination of Type of Civilian Work to be Performed.

(a) A registrant in Class I-O who has not volunteered for civilian work in accordance with paragraph 2 of this memorandum, shall be mailed a Special Report for Class I-O Registrants (SSS Form 152) within 10 days after a Statement of Acceptability (DD Form 62) has been mailed to him or within 10 days after he has failed to report for or submit to Armed Forces physical examination. Thereafter, the registrant shall be processed in accordance with the pertinent provisions of section 1660.20 of the regulations.

(b) In submitting the three types of work to a registrant in conformity with section 1660.20(b) of the regulations the local board should designate three actual types of work in general terms such as

can be reached, the work which the local board orders the registrant to perform "shall be designated as a very general type" Paragraph 5(b) encourages local boards to seek advice concerning prospective employers from the State Director, but the existence of

maintenance work in a state hospital, institutional work in a mental institution, or hospital work in a state hospital. The employer or employers with whom this work is available should also be indicated. No particular number of possible employers is necessary, and the requirement of the regulation is satisfied if three types of work with one employer are specified when other places of employment are not available.

(c) Whenever a meeting is held in accordance with the provisions of section 1660.20(c) of the regulations the local board shall make a written summary of the meeting which shall include (1) the date and place of the meeting, (2) the names of those present, including the name of the State Director or his representative and the names of the local board members, (3) information as to whether any agreement was reached with the registrant as to a type of civilian work which should be performed by the registrant in lieu of induction, and (4) any other facts or information developed. The completed summary should be signed by a member or by the Executive Secretary of the local board and filed in the registrant's cover sheet. The meeting must be held even though the registrant has previously stated that he will not attend. If the registrant does not attend the meeting with the local board, the summary should specifically note the registrant's absence, and shall set forth the order by the local board as to the type of work which it deems appropriate to be performed by the registrant and the name of the employer where such work is available. This work shall be designated as a very general type, such as "hospital work", "institutional work", "welfare work", "relief work", or work described by a similar general designation. The local board's determination shall be made a matter of record in the registrant's file, and include a statement that the local board authorizes the issuance of such work order if the type of work is approved by the Director under section 1660.20(d) of the regulations and paragraph 5 below.

5. Approval of Order to Civilian Work by Director of Selective Service. (a) Whenever the local board and the registrant are unable to agree as to the type of civilian work the registrant is to perform, the local board shall determine the type of work which is appropriate and available to be performed. The local board shall submit to the Director of Selective Service through the State Director a letter stating the type of work the registrant is to perform, stated in general terms as illustrated in paragraph 4(c), above, including the name and address of the employer where such work is available, with a request that the Director approve the ordering of the registrant to perform that specific work. The cover sheet of the registrant shall be forwarded to the Director for review in each case.

(b) There are no "official" lists of "approved" employers who will employ or offer employment to Class I-O registrants. Congress has provided in section 6(j) of the Military Selective Service Act of

"official" lists of "approved" employers is flatly denied.⁵² Even when a specific employer has been selected, however, paragraph 6 provides that "a registrant shall not be ordered to a specific position. . . ."⁵³ Finally, paragraph 7 requires strict adherence to the regulatory scheme:

If a material error has occurred at any point in the processing of a Class I-O registrant for assignment to civilian

1967 that the local board shall determine the appropriateness of the work a I-O registrant is to perform. A local board, however, is encouraged to seek advice concerning prospective employers from the State Director for the State in which the local board is located, or from the Director of Selective Service. Some states maintain lists of employers who have employed I-W registrants, and when a local board seeks advice concerning such employers, a State Director may comply with such request. Such advice, however, is not binding upon the local board. National Headquarters of Selective Service does not maintain a list of employers.

(c) When the Director approves the request, a letter of approval will be transmitted to the local board authorizing it to order the registrant to perform the type of work with the employer designated by the local board. The letter shall be placed in the registrant's cover sheet.

LBM 64, para. 4 and 5, SSLR 2183.

52. See also LBM 98, para. 5, *supra* note 5. But see SSS Form 152, Series I, *supra* note 35.

53.

6. Order To Report for Civilian Work. The Order To Report for Civilian Work and Statement of Employer (SSS Form 153) shall be used in ordering Class I-O registrants as outlined in subparagraph (a) above to perform approved types of civilian work in lieu of induction. Instructions concerning its preparation, use, and distribution are printed on the back of the form. However, in executing the form *a registrant shall not be ordered to a specific position with an employer but the description in the order of the type of work shall be broad enough to include any specific position which the employer may require the registrant to fill during the period he is performing his civilian work.* The manner in which the appropriate spaces on SSS Form 153 should be completed is illustrated in two instances by the following examples:

"Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest, you have been assigned to *institutional work* located at *Kentucky State Hospital, Danville, Ky.*"

"Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest, you have been assigned to *welfare work* located at *Mennonite Central Committee, Akron, Pa.*"

LBM 64, para. 6, SSLR 2183 (emphasis supplied).

work, that error should be corrected and the processing resumed from the point of error even though it requires the repetition of actions previously completed.

This provision has no parallel in any other rule or regulation of the Selective Service System. It is no doubt an expression of caution, intended to avoid errors in the processing that a court may later find to have robbed the CO from as much of a free choice as the statute and the regulations grant him.

But in the amended LBM 64, a dramatic change took place in September, 1968, giving for the first time official expression to the Director's earlier informal disruption and restriction directives.⁵⁴ He cast aside the cautious design of his own earlier official rules and attempted to give the local boards a discretionary power which, in the past he neither believed they could openly exercise, nor possibly that they are permitted by the statute to have. This unauthorized grant of power officially, though unlawfully, now supplied the framework for the application of the restrictive rules by the boards.

2. *The Theory of Parallelism.*

It has been demonstrated that the disruption rules have no basis in and contradict the statute, national policy, legislative intent, Presidential regulations, and even the Director's own pre-1968 official rules. In fact, their apparent basis lies solely in his own fictitious theory of alternative service. The heart of that theory involves an asserted requirement of parallelism of hardship between the COs' and the soldiers' lives.

The most obvious valid element of parallelism, one which the Director has not cared to discuss, is the statutory requirement that the CO perform his alternative service for the same length of time as the soldier performs his military obligation. This, however, only insures that the *quantity* of service, measured in years, shall be the same for both. The *quality* of service, by its very nature, can never be the same.

Another element of valid parallelism is the statutory requirement that the CO's service, like that of the soldier, serve the national interest. But, this provides no basis for the Director's restrictive rules where the national interest can be served by employment in a broad area of available employment without disrupting the conscientious objector's life. Certainly disruption of the soldier's way of life is necessitated by the particular nature of his service to the nation. But

54. See note 5 *supra*.

he is not subjected to *unnecessary* harassment in his military status and certainly not for his beliefs.

The regulation which specifies that a CO may not be called to civilian service earlier than he would be called to military service if he were not a CO⁵⁵ also has the character of parallelism. But closer examination reveals that its only function is to clarify the statutory phrase "in lieu of induction." At the beginning of the Korean War, when local boards had little experience in processing the applications of conscientious objectors, some boards processed all those classified I-O for civilian service immediately, irrespective of whether the selection method then in force would have called the registrant to military service if he were not a CO.

Finally, an aspect of parallelism is suggested by the regulation requiring the physical and mental examination of all registrants available for service, *i.e.* those classified I-A (subject to normal military service), I-A-O (subject to noncombatant military service) or I-O (subject to alternative civilian service), without setting different qualification standards for any of the three classes.⁵⁶ Obviously, the presumption is that the CO, being called to civilian service "in lieu of induction", should not be ordered to perform such service if he could not be inducted into the armed forces in any case because of some physical or mental disqualification.⁵⁷

These tenuous parallels may well have formed the foundation on which General Hershey built his own parallelism theory as a vehicle for his restrictive rules. One need only note his expressed attitude with respect to the status of conscientious objectors, so utterly negating the language and spirit of their statutory exemption:

[A] conscientious objector *is subject to the draft*, the only difference being that he must serve his country in civilian work contributing to the maintenance of the national health, safety, or interest instead of the Armed Forces. (Emphasis added).⁵⁸

In fact, the Director considers COs and other registrants who are not inducted to be no less than *inactive* members of the armed forces, rather than civilians. He states that:

55. R1660.20(a), *supra* note 25.

56. *Id.* The actual standards are promulgated by the Department of Defense rather than the Selective Service System.

57. Note, however, that LBM 64, para. 3, made it possible, since 1962, to call an I-O registrant to civilian service even if he failed to submit to the physical examination. Until very recently there was no similar provision with respect to I-A and I-A-O registrants called to military service.

58. LEGAL ASPECTS OF SELECTIVE SERVICE, *supra* note 6 at 10 citing *Roodenko v. United States*, 147 F.2d 752 (10th Cir. 1944), *cert. denied* 324 U.S. 860 (1945).

[it] is clearly the purpose [of Congress] of dealing with the *registrants as members of the Armed Forces rather than civilians* . . . What is a registrant? Certainly he is *not* a member of the *active* Armed Forces. It is equally obvious that a registrant has a *status other than* that of a *civilian*. (Emphasis supplied.)⁵⁹

But the Director never explained why there is no need to disrupt the lives of registrants, other than COs, whose exemption or deferment is similarly predicated on their performing work in the national interest (such as students, ministers of religion, apprentices, farmers, engineers, and scientists).

Once the theory of a new parallelism is injected into the criteria for "appropriate" alternative service, the illegal goals are achieved in two steps. First, the door is opened to the issuance of restrictive rules by the Director, *i.e.*, by the author of the theory, himself. And second, the boards are given discretion to apply the new invidious principle at will, both within and even beyond the Director's specific rules. A clear example for such an effect on the boards has come to light just recently in a Selective Service official's assertion that no rules bind any board.⁶⁰ More examples are found in some punitive practices by local boards which have no authority in any rule, not even the Director's restrictive LBMs. Among these is the refusal to assign a CO to a job which he already holds at the time of his processing for alternative service,⁶¹ the board's disregard of the CO's experience and skills, and their pervasive insistence that only jobs on the State Director's list are "appropriate" work, notwithstanding the National Director's formal declaration that such lists are unofficial.⁶² But perhaps the most objectionable consequence of local board discretion to apply the theory of parallelism is the boards' refusal to allow COs to perform any work which they are interested in performing. Such applications of the disruption rule violate even the theory of parallelism itself, because the armed forces do assign men, where possible, according to their preferred occupational skills.

The invalidity of these practices is inescapable when Series I and II of SSS Form 152, which carries out the provisions and intentions

59. Hershey, *What Is a Registrant?* SELECTIVE SERVICE NEWS, Feb. 1970.

60. In a case where the CO was not permitted by his board to perform alternative service in a place which was only 45 miles away from his home, the Deputy Director of New York State Selective Service Headquarters stated "[B]oards have full power to make rules or waive them as they see fit." The New York Times, December 23, 1970 at 29.

61. See note 36 *supra* and accompanying text.

62. See note 52 *supra* and accompanying text.

of R1660.20, are considered. If the boards were permitted to reject systematically those types of work which the registrant offers to perform in the first step of processing, solely because these are obvious types of work which would not disrupt his life or subject him to hardship, then the respective provisions of the regulation and Form 152 would be nothing more than a sham.

In sum, the disruption and restrictive rules attempt to overturn a statutory and regulatory scheme permitting the CO to "volunteer" for nationally useful civilian work chosen by him. Instead these rules establish a system of work-selection that eliminates all the choices which the CO would voluntarily make and forces him to submit to assignments he would never voluntarily accept and to which he submits only under the threat of criminal penalty.⁶³

III. THE LEGAL CONSEQUENCES OF ILLEGAL RESTRICTIONS

A. The Local Boards' Unlawful Decisions

It has already been demonstrated that the disruption rules promulgated by the Director's LBM's have no lawful basis in the statutory and regulatory scheme. Hence, the government has found it necessary to argue that the LBM's are advisory in nature and do not have the force of law. Whether one accepts this contention or views the entire practice of the boards as evidence that they do consider the LBM rules binding upon them, there can be no doubt that those rules have placed before the boards invalid standards for assigning COs to alternative civilian service.

The situation of a registrant adversely affected by the invalid standards placed before his draft board is analogous to that of a defendant convicted by a jury after a judge has charged them with an erroneous interpretation of the law. Local board members are laymen, as untrained in the law as are jurors. They derive their understanding of the law from the Director just as jurors derive theirs from the judge. The boards have actual notice of the statute and the regulations, but both are interpreted for them by the Director.

It is reasonable to assume that the CO's file will rarely contain written evidence supporting the fact that the board has acted by applying the restrictive rules. Therefore, it may appear that the Supreme Court's decision in *Chemical Foundation*, regarded as the cornerstone of the principle of presumption of regularity may not be distinguishable even though it expresses the presumption of public

63. This argument is further supported by R1660.10 and SSS Form 151, Application of Volunteer for Civilian Work, SSLR 2156:15.

officers having discharged their official duties properly with the caveat "clear evidence to the contrary".⁶⁴ (Such "evidence to the contrary" may, of course, be produced from testimony about oral proceedings before the board.)⁶⁵ More importantly, however, a line of recent decisions, including some by the Supreme Court, have altered the conditions under which the presumption of regularity in administrative proceedings is applicable. Where invalid legal standards were in fact before the board when it rendered its decision and where that decision has no basis in valid legal standards, it is now presumed that the invalid standards were in fact followed.⁶⁶

B. Entrapment and Intimidation

Given that they place invalid legal standards before the local boards, the present impact of LBMs 64 and 98 is twofold. They entrap the unwary into a species of involuntary servitude, and they intimidate those who are aware of the restrictions into subordinating their moral convictions. Entrapment of the unwary is best illustrated with reference to Series I of SSS Form 152. There the CO is asked to offer three types of work in order of preference. True, the form indicates that he should select the types of work from a list on file with the local board, but that restriction was set aside nine years ago.⁶⁷ Thus, the form suggests that the registrant can "offer," *i.e.* voluntarily undertake, appropriate work of his own choice, as long as the types of work he offers to perform fit within the definition provided by selective service law.

Notice regarding the relevant selective service law is supplied early in the classification procedure. When the registrant first applies for CO status he fills out SSS Form 150, which quotes section 6(j) of the Act in its entirety. Since this section refers to Presidential regulations pursuant to which his draft board will determine the appropri-

64. "[Courts] presume that [public officers] have properly discharged their official duties unless there is clear evidence to the contrary." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

65. Or, the registrant may have filed with the board a resume of the discussion during his meeting with the board which would show remarks by the board members bearing out the fact that they were applying the Director's restrictive rules.

66. *Cf.* Justice Harlan's concurring opinion in *Oestereich*, note 39 *supra*: "[A] challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity but presents an issue beyond the competence of the Selective Service boards to hear and determine." 393 U.S. at 240. *See also* *Shepherd v. United States*, 217 F.2d 1942 (9th Cir. 1954), *rehearing denied*, 220 F.2d 855 (1955).

67. LBM 64, para. 5(b), note 47 *supra* and accompanying text.

ateness of the types of work he offers to perform, he has notice that the work he offers to perform must meet the Presidential specifications. But he has no notice whatever of the Director's restrictive rules. LBMs are not published in the Federal Register, and they are not given to the CO at any stage of the classification or assignment process.

During the work selection process under R1660.20(b), the registrant has three opportunities to obtain a voluntary work assignment, *i.e.* one which he desires. The first is when he initially offers his three types of work, the second is when the board submits its own counter-proposals, and the third is at the meeting between the board and the registrant where they attempt to reach an agreement, presumably not excluding an assignment which is different from any of those offered and proposed earlier. The first opportunity (which significantly gives the registrant even the freedom to name a first, second, and third choice) is the most important, but this opportunity would obviously be wasted if the CO does *not* know, because he has neither legal nor effective notice, that only disruptive employment will be approved by the board. In fact, as the board must assume that the registrant will only offer work which would not disrupt his life and not cause him personal hardship, his offer to perform three given types of work is already automatically excluded from approvable employment. In such cases, the registrant's statement of preferences invited by the Form's instructions, serves no other purpose than to deceive him into helping the local board fashion a disruptive and involuntary work assignment order.

Those conscientious objectors who do come to know at an early point in time about the existence of disruptive and restrictive rules, are in no better position. It is not uncommon for local board personnel to mention the restrictions in the attempt of deterring the CO at the outset from seeking I-O classification. Nor does this intimidation cease when the application for I-O classification has already been filed. Many boards use the CO's personal appearance before them to impress upon him the probable hardships which will be attached to his civilian service. This amounts to impermissible chilling of the CO's exercise of his rights under the law with serious First Amendment implications.⁶⁸ The disruption rules may also be used to coerce the registrant into changing his mind and accepting non-combatant

68. *Cf. Oestereich v. Selective Service System*, note 39 *supra*. In an analogous case, *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court found it offensive to the free exercise clause of the First Amendment to inflict hardship on an individual whose religious belief requires that Saturday be her Sabbath by withholding her unemployment benefits because she would not accept any of the only available jobs that required work on Saturdays.

(I-A-O) service in the armed forces. This practice is apparently so widespread that the present Director recently warned:

A registrant claiming class I-O, who in the opinion of the local board has not provided sufficient evidence to warrant the I-O classification, shall not be classified in class I-A-O as a compromise.⁶⁹

C. Availability of Injunctive Relief

Given the hardships which work orders rendered pursuant to the Director's restrictive rules will impose, injunctive relief should be available to the registrant as soon as the unlawful work order is issued. But section 10(b)(3) of the Selective Service Act prohibits judicial review before the registrant responds to his induction or civilian work order. While the courts have progressively narrowed this restriction, all the decided cases have dealt with registrants facing induction rather than COs about to perform civilian service.⁷⁰ Nevertheless, there are grounds for providing *both* sets of registrants with opportunities for judicial review. First, both categories of registrants are capable of responding "affirmatively or negatively." The important difference, however, is that the affirmatively responding inductee immediately becomes a member of the armed forces for whom review is possible only by *habeas corpus* proceedings. But a CO who has responded affirmatively to an unlawful work order remains a civilian for whom other avenues of relief, including injunction and mandamus, should remain available.

Second, the principal rationale for the statutory prohibition has little bearing on the process which assigns a CO to civilian employment. The "litigious" CO who delays the performance of his civilian service does not jeopardize the national defense. Thus, the urgency of induction asserted by the government in cases involving I-A registrants can have no relevance to the CO.⁷¹

Third, the primary consideration favoring early review is equally applicable to both groups. Where invalid rules were used "to deprive registrants of their statutory exemption" the Supreme Court granted review because to withhold it would "deprive petitioner of his liberty without the prior opportunity to present to any competent forum—

69. LBM 107, para. 17, July 6, 1970.

70. See *Oestereich v. Selective Service System*, note 39 *supra*. Cf. *Fein v. Local Board No. 7*, ___ F.2d ___ (2nd Cir. 1970), 3 SSLR 3231.

71. In fact, the government has not even succeeded in impressing the courts with the urgency of induction being sufficient to bar pre-induction judicial review.

agency or court—his substantial claim that” the order was issued “pursuant to an unlawful procedure.”⁷² While the CO facing an unlawful work order is not deprived of his statutory exemption, he is deprived of the benefits of that exemption. And work orders issued pursuant to the disruption rules, like induction itself, deprive the registrant of his liberty.

If injunctive relief is to be made available it should probably arise even before the work order issues, provided that the registrant has substantial evidence that an impending work order will disrupt his life or impose other hardships sanctioned by the restrictive rules. Certainly there can be no assertion that the CO has failed to exhaust his administrative remedies. There is no appeal from the work selection procedure, and intervention by the State or National Director must inevitably prove futile.⁷³ Moreover, the draftee may be rejected at the induction station for some physical, mental or moral disqualification. The conscientious objector, on the other hand, has already passed his “pre-induction” examination (or is presumed to be qualified if he failed to undergo that examination)⁷⁴ when the work selection process begins.

CONCLUSION

These comments are intended to show that a clear understanding of longstanding national policy, discernible legislative intent, a correct construction of the statutory scheme for alternative civilian service, and the proper interpretation of the regulatory provisions to carry out that scheme are sufficient to establish the invalidity of the disruption rules. It does not appear necessary to reach the constitutional considerations arising from a possible conflict between these rules and Constitutionally guaranteed rights.⁷⁵

Finally, a note of caution is required for conscientious objectors in the process of selecting work assignments. In reading these com-

72. *Oestereich v. Selective Service System*, note 39 *supra*.

73. There is sufficient authority for the inapplicability of the requirement for exhaustion of administrative remedies where an appeal would be futile because there is a misconception of the law by the Selective Service System. *United States Ex rel. Plotner v. Resor*, ___ F. Supp. ___ (S.D. Ga. 1970), 3 SSLR 3342, citing *United States v. Owens*, 415 F.2d 1308 (6th Cir. 1969).

74. See note 57 *supra*.

75. If the disruption and other restrictive rules were found, contrary to the conclusion derived here, to be in conformity with the regulations and even with the language and intent of the statute, it would become necessary to examine the disruption rules for conflict with Constitutional guarantees. Among these constitutional considerations would be: the taking of liberty (by banishment to a distant working place) and of property (by barring from available well

ments, they should realize that they tread on ground which is largely uncharted by any judicial authority bearing directly on the validity of the disruption and restrictive rules themselves. These comments should be clearly understood to be new arguments that *might* be successfully used in litigation. The conscientious objector must not be encouraged to rely on such success and to disobey, because of such reliance, even a flagrantly disruptive work order, in the expectation that if he is prosecuted for such refusal these arguments will bring about his acquittal.

paying jobs) without due process; denial of equal justice (by permitting the boards to deny one CO work that they have approved for another CO); inflicting punishment of a nature beyond permissible administrative penalty and which ought to be reserved to judicial process.

APPENDIX

Summary Of The Specific Restrictive Rules

These rules culled from various parts of the LBMs are enumerated here in the order in which they appear, first in LBM 64 and then, continuing, in LBM 98.

- a. Whenever possible, the work should be performed outside of the community in which the registrant resides. (LBM 64, para. 1).
- b. The position should be one that cannot readily be filled from the available competitive labor force, or from civil service or merit registers of the Federal, State or local governments. . . . (LBM 64, para. 1).
- c. The conscientious objector's pay should be reasonably comparable to the pay, allowances and other benefits received by the man inducted into the Armed forces. . . . (LBM 98, para. 2).
- d. [H]is assignment should be beyond commuting distance from his home. (LBM 98, para. 2).
- e. It is not advisable to assign a I-O registrant to a job that is sought after by other qualified people. . . . (LBM 98, para. 3).
- f. [A] job which qualifies a registrant for occupational deferment should never be deemed appropriate alternative service, since the registrant would not be reached for I-W service while he was eligible for occupational deferment. (LBM 98, para. 3).
- g. Consideration should be given to utilization of skills . . . but . . . it is not always practicable to assign a man to a job where he will be able to utilize all of his special skills. (LBM 98, para. 4).

18. U.S. V. SEEGER, ETHICAL UNION AMICUS BRIEF

IN THE
Supreme Court of the United States
 October Term, 1964

No. 50

UNITED STATES OF AMERICA,

*Petitioner,**v.*

DANIEL ANDREW SEEGER,

Respondent.

**On Writ of Certiorari to the United States Court of
 Appeals for the Second Circuit**

**BRIEF FOR THE AMERICAN ETHICAL UNION
 AS AMICUS CURIAE**

The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union with the consent, filed with this Court, of both parties.

The American Ethical Union is a federation of the Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethi-

cal Culture Movement". The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. The Movement has had a marked growth in recent years. Since 1949 membership has doubled and the number of Societies and Fellowships has increased four-fold.

There are today thirty Societies and Fellowships of the American Ethical Union in eleven states and the District of Columbia. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of Humanist and Ethical Culture groups. At the third International Congress held in Oslo in 1962, delegates attended from 24 countries including the United States, Great Britain, Iran, Holland, Norway, Germany, Japan and Colombia.

Ethical Culture has been recognized as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso v. Watkins*, 367 U. S. 488 at 495, n. 11. Ethical Culture is listed as a religion in the Census of Religious Bodies published by the Federal Government,¹ and in various religious publications² and general reference works.³ Federal tax exemption rulings have been issued

1. U. S. Bureau of the Census, Dep't of Commerce, *Religious Bodies*, 1936 (1941).

2. *Yearbook of American Churches* (Landis ed. 1958); *A Guide to the Religions of America* (Rosten ed. 1955); Burt, *Types of Religious Philosophy* (1939); Ferm, ed. *Religion in the Twentieth Century* (1948); 5 *Encyclopedia of Religion and Ethics* (Hastings ed. 1928).

3. Hutchinson, *Twentieth Century Encyclopedia* (rev. ed. 1952); 21 *Dictionary of American Biography* (Starr ed. 1944); 8 *Encyclopedia Britannica* (14th ed. 1932); 10 *Encyclopedia Americana* (1947 ed.).

to the American Ethical Union and to the various Ethical societies. The District of Columbia Society has been held to be "a religious corporation or society," the building of which "is one primarily and regularly used by its congregation for public religious worship," within the meaning of the District of Columbia Code provision exempting property of "religious societies" from certain local taxes. *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957).

All the Ethical Culture Societies and Fellowships conduct services and most conduct religious schools for children which meet regularly on Sunday mornings. The Leaders of the Ethical Culture Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the services customarily performed by ministers of religion, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

A fundamental tenet of Ethical Culture is the freedom of each individual to determine for himself whether or not to relate his religious aspirations to the existence of a Supreme Being. The Ethical Movement has no fixed creed or dogma, and requires no particular theological beliefs of its members. It

"holds that, although the universe which we all share, speaks to us in different accents or tongues, no one can

be sure, or prove to others, which one is true. The Ethical Movement therefore, is uncommitted on theological and metaphysical questions. Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind.'" [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y. p. 3]

The American Ethical Union is concerned with any Governmental elevation and approval of theism as the only true religion and the deprecation of its own religious pattern. It has an interest in the continued recognition of Ethical Culture as a religion for all purposes, including the right of its members to conscientious objector status on an equal basis with adherents of other faiths. It has a further interest in preserving the rights of individual conscience free from Governmental imposition of any rigid orthodox formula defining religion.

ARGUMENT

The First and Fifth Amendments prohibit discrimination against conscientious objectors who hold non-theistic beliefs.

Endeavoring to avoid repetition of other briefs herein, we will present in this brief considerations which demonstrate, we believe, the unconstitutionality of the Government's use of belief in a Supreme Being as the criterion of

religion; the established and important role of non-theistic religions; the lack of justification for the Supreme Being clause from the standpoint of administrative convenience; and the unreasonableness, even apart from the First Amendment's guarantee of Government neutrality between religions, of discriminating between conscientious objectors who hold theistic beliefs and those who hold non-theistic beliefs.

The issue before the Court is whether the Government can, consistently with the First Amendment, act as the arbiter of religions, determining what is accredited religious belief or what an individual must believe to be religious. Almost throughout its argument, however, the Government assumes that "religion" within the protection of the First Amendment necessarily implies belief in divine command, God, and a Supreme Being⁴, thus assuming the answer to the crucial issue and avoiding confrontation with the reasoning of the Court below.

In refutation of the Government's interpretation of the First Amendment, stands this Court's *Torcaso* opinion. There it recognized that religion in the First Amendment sense includes both "religions based on a belief in the existence of God" and "religions founded on different beliefs." The Court mentioned several religions, including Ethical Culture, "which do not teach what would generally be considered a belief in the existence of God * * *" (367 U. S. at p. 495, n. 11). The Supreme Being provision and the Government's defense of it can be reconciled with *Torcaso* only if it be supposed that this Court there used the

4. *E.g.*, Govt. Brief, pp. 10, 13, 20, 22, 24, 35, 71, 75-77.

word "God" in some sense which differs from "Supreme Being." Such a differentiation, however, would permit the Government to intrude and draw metaphysical distinctions in the area of spiritual belief—exactly the result which we think *Torcaso* intended to proscribe. Indeed, the type of ratiocination in the Government brief as to the nature of a Supreme Being (Govt. Br., pp. 72-75), illustrates, we believe, the evil of the clause and the value of the *Torcaso* doctrine that concern with a theistic or non-theistic basis of religion is not the business of Government.

The recognition in *Torcaso* of religions without a theistic creed, was based on the established place of these religions historically and in the culture of today.

A. The Beliefs of the Non-Theistic Religions

Non-theism is a view which neither categorically denies, nor dogmatically affirms, the existence of a Supreme Being. Recognizing the limitations and the fallibility of the human intellect and the proper restriction of its use to matters of experience, non-theism argues that the existence or non-existence of God is not susceptible of proof and should, therefore, be left entirely within the realm of private belief. Organized non-theistic religious groups, such as the Ethical Culture Societies, include members whose personal faith includes a Supreme Being, and those whose personal faith does not.

As long ago as 1886, Felix Adler, founder of the Ethical Movement, pointed out:

"Religion is not identical with theology. It is indeed often maintained that the belief in a personal God

should be regarded as the foundation and criterion of religion * * *."

But, he added,

"It is the moral element contained in it that alone gives value and dignity to any religion, * * *. The appeal to conscience has ever been the lever that raised mankind to a higher plane of religion."⁵

Three decades ago John Dewey wrote *A Common Faith*, devoted to separating "the religious phase of experience * * * from the supernatural and the things that have grown up about it." [Dewey, *A Common Faith* (1934), p. 2.] He wrote that religious qualities "are not bound up with any single item of intellectual assent, not even that of the existence of the God of theism" (*ibid.* p. 32). To him "religious" signified an attitude, "independent of the supernatural" (*ibid.* p. 66).

In his book, *Ethics as a Religion* (1951), Dr. David Saville Muzzey, a Leader in the Ethical Culture Movement, points out (pp. 86-87) that "Everybody except the avowed atheists (and they are comparatively few) believes in some kind of God", and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of a God do you believe in?" In an attempt to answer that question Dr. Muzzey continues (p. 95):

"Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely

5. Adler, *Creed and Deed* (1886), pp. 37, 163-164.

mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that expresses itself in the human world as the power which inspires in man moral purpose.”

* * *

“Thus the ‘God’ that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward ‘the knowledge, love and practice of the right.’ ”

Lord Snell, a former President of the British Ethical Union, described the non-theistic position of the Ethical Culture Movement as follows:

“The central purpose of the Ethical Culture Movement is to establish in the world a religion devoted to the right, apart from supernatural sanctions * * * With regard to the ultimate nature of things, a life after death and the final goal of the universe, the Ethical Movement affirms no creed. Its members may have divergent views on these problems but they unite in devotion to good action in the world in which they live.”⁶

The viewpoint of the Humanist Movement has been set forth by Curtis W. Reese, Secretary, Western Unitarian Conference, as follows:

“To Humanism ‘worship’ means the reverential attitude toward all that is wonderful in persons and

6. Quoted by W. Edwin Collier in *The Standard* (Jan.-Feb. 1951) p. 223.

throughout all of life; a wistful, hopeful, expectant attitude of mind, not abject homage to either 'Humanity' or 'God' * * *

"Humanism is not Atheism. Atheism is properly used as a *denial* of God * * * [T]he Humanist attitude toward the idea of God is *not that of denial* at all; it is that of *inquiry*. The Humanist is questful; but if the quest be found fruitless he will still have his basic religion intact, viz., the human effort to lead an abundant life." (Reese, ed., *Humanist Sermons* (1927), pp. vii, viii. Emphasis in original.)

A more recent statement of the non-theistic, humanistic approach to the problems of belief is set forth in an article by Professor Kai Nielson of Amherst College:⁷

"Religion is not a kind of science—not even a 'supra-science'; nor is it any other kind of a *theory*. It is instead a practical activity with some reasonably definite functions. Religious discourse is essentially a figurative, non-literal discourse * * * [R]eligious utterances are ritualistic or ceremonial utterances that express our basic commitments and concerns.

* * *

"The function of religion in a culture in crisis (or for that matter in any culture) is to serve as a figurative expression of the regulative maxims that guide men's lives and express their ultimate concerns.

* * *

"I would argue that a resolute humanism is best able to meet men's religious needs in a democratic and scientifically oriented society * * * [It] can see the creativity in all religious expressions without assuming the uniqueness or dominance of any single sym-

7. Religion and the Modern Predicament, *The Humanist* (Jan.-Feb. 1958) pp. 26, 28, 29.

bolistic form * * * [and] can see and assert the religious (ideal) qualities in natural experience.

* * *

“Humanism does not, as it is often parodied as doing, worship man’s ego-centered image of his own divinity, though humanism quite rightly recognizes and emphasizes man’s worth and dignity * * * The object of worship for a humanist is indeed man; but here the noun ‘man’ is understood collectively as denoting all mankind, and not as denoting man taken distributively with his masterless egocentric worship of his individual ego’s lusts to power.”

These samples of Humanist and Ethical Culturist non-theistic thought could be multiplied many times by quotations from world-renowned philosophers and psychologists. Alfred North Whitehead declared that “Religion is what the individual does with his own solitariness.” A. Eustace Haydon conceives of religion as “the shared quest for the good life.” Erich Fromm recognizes non-theistic as well as theistic religions and defines religion as “any system of thought and action shared by a group which gives the individual a frame of orientation and an object of devotion.” And the celebrated biologist, Julian Huxley, has written:

“I have called this book *Religion without Revelation* in order to express at the outset my conviction that religion of the highest and fullest character can co-exist with a complete absence of belief in revelation in any straightforward sense of the word, and of belief in that kernel of revealed religion, a personal god.”⁸

8. Whitehead, *Religion in the Making* (1926), p. 16; Haydon, as quoted in Morain, *Humanism as the Next Step* (1954), p. 12; Fromm, *Psychoanalysis and Religion* (1950), p. 21; Huxley, *Religion without Revelation* (1957), p. 1.

B. The History and Development of Non-Theistic Religion

The roots of the non-theistic religious movement in Western culture go far back. Such views are found in the Middle Ages, and during the renaissance there was a resurgence of non-theistic philosophy and a renewed interest in human problems and the concept of the dignity of man.⁹ Non-theistic religious views are found in Jewish thought of the sixteenth and seventeenth centuries,¹⁰ and in the writings of Spinoza,¹¹ Kant,¹² Auguste Comte, and John Stuart Mill.¹³ In the early days of the United States, Benjamin Franklin, Thomas Jefferson, Thomas Paine and many others expressed interest in the development of a religion based on reason rather than revelation.¹⁴

It was during the nineteenth century, however, that non-theistic religious movements developed significantly in American life. It was, in part, the revolt against dogmatism which led the New England Unitarians to transmute

9. Kristeller, in Ferm, ed., *A History of Philosophical Systems* (1950), pp. 227-238; Cassirer, Kristeller and Randall, *The Renaissance Philosophy of Man* (1948).

10. Rivkin, *Leon da Modena and the Kol Sak'hal* (1952), pp. 6-17.

11. Wolfson, *Philo: Foundations of Religious Philosophy in Judaism, Christianity and Islam* (1947), pp. 458-459.

12. Kant, *Critique of Pure Reason* (1781), Book II, §2, Chap. III, §7; Tsanoff, *The Great Philosophers* (1953), p. 455.

13. Aiken, ed., *The Age of Ideology: The 19th Century Philosophers* (1956), pp. 122-123; Mill, *Nature and the Utility of Religion* (1958), pp. 68-69.

14. Schneider, ed., Benjamin Franklin: *The Autobiography and Selections* (1952), xiv, 57.

the traditional concept of divine Christ to the concept of a human Jesus, a great moral teacher and leader. William Ellery Channing, their most distinguished leader, said "the adoration of goodness—this is religion."¹⁵ The transcendentalism of Emerson¹⁶ and Thoreau¹⁷ and the "manly theology" of Theodore Parker,¹⁸ were primarily concerned with man and his relation to his fellow man. Their basic concern was to subordinate inconclusive debate about the existence and nature of God to an attempt to improve human society by furthering humaneness in the relations between man and man.

After the Civil War, non-theistic religious movements in the United States began to multiply. Unlike the pre-Civil War groups, which had attempted to establish Utopian communities,¹⁹ the newer movements continued to live in the world and to attempt to change it by participating in social reforms. Out of the Unitarian group there began in 1866 the important Free Religious Association,

15. 2 Parrington, *Main Currents of American Thought* (1930), p. 332.

16. Schneider, *A History of American Philosophy* (1946), Ch. 25; Blau, *Men and Movements in American Philosophy* (1952), pp. 121-131; Blau, ed., *American Philosophic Addresses, 1700-1900* (1946), pp. 586-604.

17. Blau, *Men and Movements in American Philosophy* (1952), pp. 131-141; Cargill, ed., *Henry Thoreau: Selected Writings on Nature and Liberty* (1952), pp. 56-107.

18. Schneider, *A History of American Philosophy* (1946), Ch. 24; Dirks, *The Critical Theology of Theodore Parker* (1948); Commager, *Theodore Parker* (1936).

19. Such communities included Brook Farm and Fruitlands, and the communal village of Modern Times (now called Brentwood) on Long Island in New York State. See Hinds, *American Communities* (2d ed. 1908).

which Emerson joined in his later years. The Association was most influential in its insistence that social reform activities were an integral part of religious faith, and in its refusal to make acceptance of theism a condition of membership. Felix Adler, founder of the Ethical Movement, was a member of the Free Religious Association for ten years. He resigned its presidency in 1882 and devoted himself to the Society for Ethical Culture in New York City, which he had founded several years before, in 1876.

C. Non-Theistic Religions Today

A widely-used authoritative survey of American religious beliefs and practices points out the truly religious character of non-theistic movements, which are described as "nonecclesiastical spiritual movements." It states:²⁰

"Unfortunately this aspect of America's religious life has been the object of but little serious study. Most of these movements do not gain their chief impetus from an organization, their major tenets are almost never set down in formal creeds; and statistics on the number of adherents are either meager or nonexistent * * * Yet such knowledge as we have forces us to the conclusion that these nonecclesiastical movements furnish the vital spiritual orientation of multitudes of the American people * * * and must be taken into account in any realistic appraisal of the religious situation in the United States."

Neither Buddhism nor Confucianism professes belief in a Supreme Being;²¹ yet both are unquestionably re-

20. Williams, *What Americans Believe and How They Worship* (1952), pp. 351-352.

21. Potter, *The Story of Religion* (1939), xvii-xviii; Archer, *Faiths Men Live By* (1934), p. 270; Hutchinson and Martin, *Ways of Faith* (1953), p. 134.

garded and treated as religions. To quote the opinion of a court in California:

“* * * there are forms of belief generally and commonly accepted as religions and whose adherents, numbering in the millions, practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions.” *Fellowship of Humanity v. County of Alameda, et al.*, 153 Cal. App. 2d 673, 315 P. 2d 394 (1957).

Thus, as was recognized in *Torcaso*, to exclude non-theistic belief from the constitutional concept of “religion” would be to exclude, among others, some of the major faiths of the world which are traditionally recognized as “religions.”²²

D. First Amendment Protection of Non-Theistic Religion

This Court’s recognition in *Torcaso* that religion in a constitutional sense embraces non-theistic beliefs had been foreshadowed in earlier cases. See *McGowan v. Maryland*, 366 U. S. 420, 466 (opinion of Frankfurter, J.): the Establishment Clause relates to

“a specific, but comprehensive, area of human conduct: man’s belief in the verity of some transcendental idea

22. The Government confuses the issue when it speaks of a continuum of beliefs ranging into the political judgments made by Congress and the President under the war-making power (Govt. Br. p. 35). Questions of religious and conscientious belief, which is the only type of belief here involved, are outside the political province.

and man's expression in action of that belief or disbelief." ²³

Historically, the draftsmen of the First Amendment must have envisioned its protection of non-theistic belief, considering the prominence and standing of the Quaker sect among the religions of the time.²⁴ Like Ethical Culture, the Quaker faith does not dictate a belief in a Supreme Being.²⁵

With recognition that the First Amendment's religion clauses protect non-theism as well as theism, it follows that the Supreme Being provision contravenes the First Amendment, and also the Fifth Amendment's due process clause, for it differentiates between conscientious objectors on a basis that is not permissible under the First Amendment. Under this provision, the Government approves, encourages and favors one religion while burdening another: an Ethical Culture member, for example, with a

23. See also *Thomas v. Collins*, 323 U. S. 516. And in *Washington Ethical Society v. District of Columbia*, and *Fellowship of Humanity v. County of Alameda*, cited *supra*, pp. 3 and 14, Ethical Culture and humanist groups respectively were held, despite their non-theistic creeds, to be "religious" within the meaning of tax exemption statutes, in part because the courts thought discrimination against them might be unconstitutional.

24. See *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 653, as to presence of Quakers in the United States in its formative period. See *United States v. Macintosh*, 283 U. S. 605, 622 to 633, dissenting opinion of Hughes, C.J., citing early New York constitution exempting Quaker conscientious objectors from military service.

25. See William Wister Comfort (President of Friends Historical Society, past President of Haverford College), *Quakers in the Modern World* (published by MacMillan, 1952), c. 5: The Foundation Tenets of Quakerism; Comfort, *The Quaker Way of Life* (1945), p. 8, quoting George Fox, a founder of Quakerism in 1624, as to "That of God in every man".

non-theistic conscientious objection to war must either compromise and forego his belief or undergo a criminal penalty. Compare *Sherbert v. Verner*, 374 U. S. 398, 404. If “the effect of a law * * * is to discriminate invidiously between religions, that law is constitutionally invalid * * *” *Braunfeld v. Brown*, 366 U. S. 599, 607.

It may be suggested that Government neutrality between religions is less than an absolute principle. For, the Government can prohibit a religious exercise which constitutes a danger to the public welfare;²⁶ in a sense, it thereby disfavors that religion while relatively aiding the others. However, the non-neutrality there is far different from the partiality in the provision at bar, for here the Government discriminates between individuals exercising the *same* religious belief—objection to combat—depending on their religious premises.

No justification can be posited for such a drastic negation of the principle of neutrality. Indeed, as we shall show, the statutory discrimination against non-theists so lacks justification, that even apart from the First Amendment guarantees, it violates the equal protection aspect of due process.

E. Lack of Reasonable Basis for Discrimination

1. The justification suggested for the Supreme Being clause—that it serves administrative convenience in determining exemptions—seems illogical.

26. *E.g.*, *Reynolds v. United States*, 98 U. S. 145: prosecution of a Mormon for polygamy held constitutional.

The purpose of the addition of this clause to the statute was to incorporate the concept of religion enunciated in a Ninth Circuit opinion.²⁷ Neither the opinion nor the statutory draftsmen indicated any intention of simplifying administration.

Determination of the registrant's belief in a Supreme Being is of no assistance in making the fundamental finding as to whether he conscientiously objects to war. Obviously, the administrators cannot draw the sometimes difficult distinction between a registrant's political belief against a particular war and his conscientious belief against all war, on the basis of belief in a Supreme Being.²⁸ Nor can belief in a Supreme Being help them to determine the sincerity of a registrant's assertion of such a conscientious belief. Most selective service registrants probably hold theistic beliefs and most, of course, are not conscientious objectors.²⁹ Thus, the Supreme Being clause adds to the administrators' burden by imposing on them responsibility for determination of another belief—including its sincerity—in addition to conscientious objection to war.

27. In *Berman v. United States*, 156 F. 2d 377 (9th Cir. 1946) rendered by a divided court, cert. denied 329 U. S. 795. See Sen. Rept. 1268, 80th Congress, 2d Sess. (1948), p. 14, as to the draftsmen's reliance on *Berman*.

28. Rather, the distinction is tested by consideration of the registrant's condonation of combat under non-political circumstances, such as invasion and devastation of his home, or extreme barbarism; thus, some who considered themselves pacifists found themselves warlike when confronted by Hitler's barbarism.

29. According to information supplied by the Selective Service Board by letter dated September 23, 1964, registrants classified as conscientious objectors from June 24, 1948 to June of 1964 totalled 26,053 out of a total, during this period, of 28,036,177 registrants.

The Second Circuit Court of Appeals suggested that a prior amendment of the conscientious objector statute to eliminate the requirement of membership in a particular sect had simplified the administrators' job (*Phillips v. Downer*, 135 F. 2d 521, 524 (2d Cir. 1943)).³⁰

The burden of an additional finding—imposed on the administrators by the Supreme Being clause—is increased by the difficulty of interpreting the words “Supreme Being”. It is not clear whether this phrase connotes a God in anthropomorphic form, a spirit of some super-human character, or a transcendent idea; whether it would include “the qualities of Godness that exist in every creation in Mankind”, or “the self-transcendent ground of being” (*United States v. Jakobson*, 325 F. 2d 409, 412, 415, note 5 (2d Cir. 1963)), “a belief in the mystery of * * * the essence being alive, * * * respecting and loving this livingness” (*Peter v. United States*, 324 F. 2d 173, 177 (9th Cir. 1963)), or the “perfect pattern, envisioned by faith, of humanity, as it should be * * *”.³¹

No longer is it possible to insist that there is a strict correspondence between religious belief and affiliation to a particular religious organization. Whatever may have been the case in the past, twentieth-century churches do not and cannot demand adherence to specific beliefs from their members, nor do modern theologians stress the organization of religion. The challenging German Protestant thinker, Dietrich Bonhoeffer, speaks of “religionless

30. During World War I exemption was granted even to non-religious conscientious objectors, as an evolution and, apparently, a simplification of administrative practice (see Govt. Br. pp. 58-59).

31. Muzzey, *Ethics as Religion* (1951), p. 95.

Christianity.” Reinhold Niebuhr sees a spiritual danger in overemphasis on the role and value of the church: “When an institution which mediates the judgment of God upon all the ambiguities of historic existence claims that it has escaped those ambiguities by this mission, it commits the same sin which the prophets recognized so clearly as the sin of Isreal.”³² Martin Buber, among Jewish theologians, has shown little concern for the institutional embodiment of religious ideas.³³

The chief contribution of the prevalent mode of theological thinking today lies in the denigration of collective worship in contrast with the confrontation of each individual with ultimate spiritual reality. The standard nineteenth-century mode of associating belief and organizational affiliation is no longer valid. It has been superseded by changes in the modern conception of the nature of religion.

Within the traditionally theistic religions, ideas of God have become so differentiated that they do not yield readily to testing by the Supreme Being clause. In Protestant Christianity, to go no farther afield, Dr. Henry Nelson Wieman rejects the theological portrait of “God as a reality beyond space and time” and insists that “God must be found in actual events,”³⁴ thus denying the transcendence of God. Karl Barth, while urging concern for “God with us,” yet argues with fervor that this “evangelical”

32. Reinhold Niebuhr, *The Nature and Destiny of Man* (1943), vol. II, p. 145.

33. See Blau, *The Story of Jewish Philosophy* (1962), pp. 295-305.

34. Wieman, *The Directive in History* (1949), p. 20.

God is transcendent.³⁵ William A. Spurrier differs from both and associates the idea of God with "the ultimate power and reality in life."³⁶ None of these views, although they are statements of men recognized as outstanding leaders of contemporary Protestant theology, is clearly and self-evidently assimilable to the Supreme Being clause. Indeed, the Supreme Being clause is open to such difference in interpretation, that it may offend the due process clause on the score of vagueness and susceptibility to unequal, arbitrary, administrative variation in application.

Finally, it has been suggested that the Supreme Being clause serves administrative convenience by decreasing the number of registrants entitled to exemption. This suggested justification is intolerable under constitutional principles. The crux of the guarantee of equal protection is the requirement of reasonable distinctions: the individual's right to inclusion in a favored group unless he can reasonably be distinguished from it.

2. The Constitutional principle of neutrality between the theist and non-theist (discussed *supra*) is paralleled by the demand from a philosophical, psychological and logical standpoint that the non-theist's conscientious belief be deemed of equal dignity and importance with the theist's.

With the elimination of the statutory requirement of membership in a pacifist religious sect, conscientious objection is necessarily a matter of individual development and personal interpretation, whether the registrant is a theist or a non-theist. A theist may or may not attribute this individually-developed conscientious conviction to di-

35. Barth, *Evangelical Theology* (1963), pp. 6, 12.

36. Spurrier, *Guide to the Christian Faith* (1952), p. 113.

vine command. Thus, even Catholic writers—unquestionably theists—have pointed out that the dictates of conscience are not necessarily connected with one's belief in God.³⁷

Historically, as well as currently, philosophers of eminence regard conscience as a sense of right or wrong unrelated to a Deity. British ethical philosophy of the eighteenth century, lying in the direct background of the founders of the American nation and authors of its Constitution, tended to proclaim an intuitionist theory of conscience under which each man has an innate sense of what is right and what is wrong, just as he has an innate sense of color. Opposed to this school, some eighteenth-century European philosophers viewed reason as the sole source of conscience. The American "Founding Fathers" drew from both views: they regarded conscience as innate, but supplemented or supported by human reason.

Thus, aside from some particular schools of theology expounding particular theist creeds, reasoning as to the nature of conscience indicates no basis for discriminating between the conscientious convictions of theists and non-theists. So too is the conclusion from psychological learning. From the psychologists' standpoint, even if in a theist view conscience is the expression of divine command, the command must be "internalized" before it can motivate.³⁸ Viewed psychologically, a conscientious conviction is a conscientious conviction, however its source may be conceived by the theologians or philosophers.

37. Von Hildebrand, *Christian Ethics* (1953), pp. 455-456.

38. Fromm, *Man for Himself: An Inquiry into the Psychology of Ethics* (1947), 143-145; compare Freud, *Civilization and its Discontents* (1930), 104-122.

Finally, only the metaphysicians will quibble as to whether a theist, who attributes his conscientious objection to divine command, feels more compelled thereby and endures greater emotional suffering from his disobedience than the non-theist. Thus, George Eliot (Marian Evans) is quoted in a conversation "concerning God, immortality, and duty, in which she 'pronounced with terrible earnestness how inconceivable was the first, how unbelievable was the second, how peremptory and absolute was the third.'"³⁹

In sum, analysis from the standpoint of the various pertinent fields of knowledge, indicate no reasonable basis for discriminating between conscientious objectors who believe in a Supreme Being and those who do not.

39. Wheelwright, *A Critical Introduction to Ethics* (1949), 125.

Conclusion

Amicus submits that the Supreme Being clause of the Selective Service Act of 1948 is an unconstitutional discrimination against conscientious objectors of non-theistic beliefs and an unconstitutional preference of theistic religion over non-theistic religion, in violation of the First Amendment; that the Supreme Being clause creates an arbitrary, unreasonable and impermissible classification between conscientious objectors of theistic belief and those who follow non-theistic religions in violation of the Fifth Amendment, and that the decision of the Court of Appeals should therefore be affirmed.

October, 1964

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Mr. Justice Douglas delivered the opinion of the Court.

This case presents an important question under the Military Selective Service Act of 1967, 62 Stat. 604, as amended, 65 Stat. 75, 81 Stat. 100.

Petitioner registered with his Selective Service Local Board and was classified I-A. Shortly thereafter he received a II-S (student) classification. In a little over a year he notified the Board that he was no longer a student and was classified I-A. Meanwhile he had asked for an exemption as a conscientious objector. The Board denied that exemption, reclassifying him as I-A, and he appealed to the State Board. While that appeal was pending, he surrendered his registration certificate and notice of classification by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining he was opposed to the war in Vietnam. That was on October 16, 1967. On November 22, 1967, his appeal to the State Board was denied. On November 27, 1967, he was notified that he was I-A.

On December 20, 1967, he was declared delinquent by the local board. On December 26, 1967, he was ordered to report for induction on January 24, 1968. He reported at the induction center, but in his case the normal procedure of induction was not followed. Rather, he signed a statement, "I refuse to take part, or all, [sic] of the prescribed processing." Thereafter he was indicted for wilfully and knowingly failing and neglecting "to perform a duty required of him" under the Act. He was tried without a jury, found guilty, and sentenced to four years' imprisonment. 283 F. Supp. 945. His conviction was affirmed by the Court of Appeals. 406 F. 2d 494. The case is here on a petition for a writ of certiorari. 394 U.S. 997.

I

Among the defenses tendered at the trial was the legality of the delinquency regulations which were applied to petitioner. It is that single question which we will consider.

By the regulations promulgated under the Act a local board may declare a registrant to be a "delinquent" whenever he

"has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) . . ." 32 CFR § 1642.4.

In this case, petitioner was declared a delinquent for failing to have his registration certificate (SSS Form No. 2) and current classification notice (SSS Form No. 110) in his personal possession at all times, as required by 32 CFR §§ 1617.1 and 1623.5, respectively.

The consequences of being declared a delinquent under § 1642.4 are of two types: (1) Registrants who have deferments or exemptions may be reclassified in one of the classes available for service, I-A, I-A-O, or I-O, whichever is deemed applicable. 32 CFR § 1642.12. (2) Registrants who are already classified I-A, I-A-O, or I-O, and those who are reclassified to such a status, will be given first priority in the order of call for induction, requiring them to be called even ahead of volunteers for induction. 32 CFR § 1642.13. The latter consequence deprives the registrant of his previous standing in the order of call as set out in 32 CFR § 1631.7.¹

The order-of-call provision in use when petitioner was declared "delinquent"² is set out in 32 CFR § 1631.7(a). The provision lists, in order, six categories of registrants and provides that the registrants shall be selected and ordered to report for induction according to the order of those categories. The first category is delinquents; the next category is volunteers; the other four categories consist of nonvolunteers. In this case, the petitioner was in the third of the six categories at the time he was declared to be a "delinquent."

¹ Under the terms of 32 CFR § 1631.7 (a)(1) in effect at the time of petitioner's trial, the first in line for induction were "[d]elinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first." That provision has been included in the new § 1631.7(a) promulgated after the random system of selection, discussed hereafter, was adopted.

² The order of call provided for by 32 CFR § 1631.7 (b) concerned calls of a designated "age group or groups," a system never used.

By virtue of the declaration of delinquency he was moved to the first of the categories which meant, according to the brief of the Department of Justice, that "it is unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early date had he not been declared delinquent."

If a person, who is ordered to report for induction or alternative civilian service, refuses to comply with that order, he subjects himself to criminal prosecution. See 32 CFR §§ 1642.41, 1660.30.

There is no doubt concerning the propriety of the latter criminal sanction, for Congress has specifically provided for the punishment of those who disobey selective service statutes and regulations in § 12 of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462 (1964 ed., Supp. IV). The question posed by this case concerns the legitimacy of the delinquency regulations, which were applied to the petitioner, so as to deprive him of his previous standing in the order of call.

II

There is a preliminary point which must be mentioned and that is the suggestion that petitioner should have taken an administrative appeal from the order declaring him "delinquent" and that his failure to do so bars the defense in the criminal prosecution.

The pertinent regulation is 32 CFR § 1642.14, which gives a delinquent who "is classified in or reclassified into Class I-A, Class I-A-O or Class I-O" three rights:

(a) the right to a personal appearance, upon request, "*under the same circumstances as in any other case*";

(b) the right to have his classification reopened "*in the discretion of the local board*"; and

(c) the right to an appeal "*under the same circumstances and by the same persons as in any other case.*" (Emphasis added.)

The right to a personal appearance "in any other case" is covered by 32 CFR § 1624.1(a). That section gives the right to "[e]very registrant *after his classification is determined by the local board*" provided a request is made therefor within 30 days. (Emphasis added.) The action taken against this petitioner, however, did not involve classification. The term "classification" is used exclusively in the regulations to refer to classification in one of the classes determining availability for service, e.g., I-A, I-O. See 32 CFR pts. 1621-1623. "Delinquency" is not such a classification, and a registrant is "declared" a delinquent, not "classified" as a delinquent. See 32 CFR pt. 1642.

The right to reopen his classification is also irrelevant to petitioner as he is not attacking his classification, but only his accelerated induction.

The right to appeal "as in any other case" is covered by 32 CFR § 1626.2(a). That section provides that "[t]he registrant . . . may appeal to an appeal board *from the classification of a registrant by the local board.*" (Emphasis added.)

Again, since petitioner was not classified in conjunction with his delinquency, but only had his induction accelerated, it would mean that he did not have the right to an appeal under the regulations.³ We are not advised, in any authoritative way, that this interpretation of the regulations is contrary to the administrative construction of them or to the accepted practice.⁴

³ Cf. *McKart v. United States*, 395 U.S. 185. In *McKart*, the petitioner, who challenged his I-A classification, was given a right to appeal under the regulations but failed to exercise it. This Court held that this failure did not preclude the petitioner from raising the invalidity of his I-A classification as a defense to his prosecution for refusal to report for induction. The doctrine of exhaustion of remedies, we held, was inapplicable where the question sought to be raised was solely one of statutory interpretation, *id.*, at 197-199, and where the application of the doctrine would serve to deprive a criminal defendant of a defense to his prosecution, *id.*, at 197.

⁴ The Department of Justice does not suggest that a registrant who has been declared a "delinquent" has administrative remedies for a review of that action. It points out, however, that the regulations, 32 CFR § 1642.4(c), provide that: "A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time." It suggests that "at least up to the time of the issuance of the order to report for priority induction, it would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty." Whatever may be the ultimate reach of 32 CFR § 1642.4(c), it seems to be conceded that it has little relevance to the present case where, the Department states, "the local board had solid evidence that petitioner had disposed himself of his draft cards."

III

We come then to the merits. The problem of "delinquency" goes back to the 1917 Act, 40 Stat. 76, as shown in the Appendix to this opinion. The present "delinquency" regulations with which we are concerned stem from the 1948 Act, 62 Stat. 604.

The regulations issued under the 1948 Act were substantially identical to the present delinquency regulations, 32 CFR pt. 1642. Nothing in the 1948 Act or in any prior Act makes reference to delinquency or delinquents. The regulations purport to issue under the authority of § 10 of the 1948 Act. Section 10, however, relates neither to selection (§ 5) nor to deferments and exemptions (§ 6), but simply to the administration of the Act as delegated to the President: "The President is authorized—(1) to prescribe the necessary rules and regulations to carry out the provisions of this title." 62 Stat. 619.

The delinquency provisions of 32 CFR pt. 1642 survived the Military Selective Service Act of 1967 largely intact. Again, however, there is nothing to indicate that Congress authorized the Selective Service System to reclassify exempt or deferred registrants for punitive purposes and to provide for accelerated induction of delinquents. Rather, the Congress reaffirmed its intention under § 12 (50 U.S.C. App. § 462 (1964 ed., Supp. IV)), to punish delinquents through the criminal law.

It is true, of course, that Congress referred to "delinquents" in § 6(h)(1), 81 Stat. 102, 50 U. S. C. App. § 456(h)(1) (1964 ed., Supp. IV) :

"As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made *after delinquents and volunteers*." (Emphasis added.)

This reference concerns only an order-of-call provision which institutes a call by age groups, 32 CFR § 1631.7(b), a provision which has never been used. This casual mention of the term "delinquents," moreover, must be measured against the explicit congressional provision for criminal punishment of those who violate the selective service laws, 50 U. S. C. App. § 462 (1964 ed., Supp. IV), the congressional provision for exemptions and deferments, 50 U. S. C. App. § 456 (1964 ed., Supp. IV), and congressional expressions emphasizing the importance of an impartial order of call, 50 U. S. C. App. § 455 (1964 ed., Supp. IV) ; H. R. Conf. Rep. No. 346, 90th Cong., 1st Sess., 9-10. Thus it was that the Solicitor General stated in his brief in *Oestereich v. Selective Service Board*, No. 46, O. T. 1968, 393 U. S. 233 :

"It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction. . . ." Brief for the United States 54.

Judge Dooling stated in *United States v. Eisdorfer*, 299 F. Supp. 975, 989 :

"The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 amendment of 50 U. S. C. App. § 456(h)(1) The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges."

Oestereich involved a case where a divinity school student with a statutory exemption and a IV-D classification was declared "delinquent" for turning in his registration certificate to the Government in protest against the war in Vietnam. His Board thereupon reclassified him as I-A. After he exhausted his administrative remedies, he was ordered to report for induction. At that point he brought suit in the District Court for judicial review of the action by the Board. We held that under the unusual circumstances of the case, pre-induction judicial review was permissible prior to induction and that there was no statutory authorization to use the "delinquency" procedure to deprive a registrant of a statutory exemption. We said :

"There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

"Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or

activities unrelated to the merits of granting or continuing that exemption." 393 U. S., at 237.

The question in the instant case is different because no "exemption," no "deferment," no "classification" in the statutory sense is involved. "Delinquency" was used here not to change a classification but to accelerate petitioner's induction from the third category to the first; and it was that difference which led the Court of Appeals to conclude that what we said in *Oestereich* was not controlling here.

Deferment of the order of call may be the bestowal of great benefits; and its acceleration may be externally punitive. As already indicated, the statutory policy is the selection of persons for training and service "in an impartial manner." 50 U. S. C. App. § 455(a)(1) (1964 ed., Supp. IV). That is the only express statutory provision which gives specific content to that phrase. That section does permit people registered at one time to be selected "before, together with, or after" persons registered at a prior time. Moreover, those who have not reached the age of 19 are given a deferred position in the order of call. But those variations in the phrase "in an impartial manner" are of no particular help in the instant case, except to underline the concern of Congress with the integrity of that phrase.

We know from the legislative history that, while Congress did not address itself specifically to the "delinquency" issue, it was vitally concerned with the order of selection, as well as with exemptions and deferments. Thus in 1967 a Conference Report brought House and Senate together against the grant of power to the President to initiate "a random system of selection"—a grant which, it was felt, would preclude Congress from "playing an affirmative role" in the constitutional task of "raising armies." H. R. Conf. Rep. No. 346, *supra*, at 9-10. It is difficult to believe that with that show of resistance to a grant of a more limited power, there was acquiescence in the delegation of a broad, sweeping power to Selective Service to discipline registrants through the "delinquency" device.

The problem of the order of induction was once more before the Congress late in 1969. Section 5(a)(2) of the 1967 Act, 50 U. S. C. App. § 455(a)(2) (1964 ed., Supp. IV), provided:

"Notwithstanding the provisions of paragraph (1) of this subsection, the President in establishing the order of induction for registrants within the various age groups found qualified for induction shall not effect any change in the method of determining the relative order of induction for such registrants within such age groups as has been heretofore established and in effect on the date of enactment of this paragraph, unless authorized by law enacted after the date of enactment of the Military Selective Service Act of 1967.

While § 5(a)(2) gave the President authority to designate a prime age group for induction, it required him to select from the oldest first within the group. S. Rep. No. 91-531, 91st Cong., 1st Sess., 1. The Act of November 26, 1969, 83 Stat. 220, repealed § 5(a)(2) question whether they were used to penalize or punish the free exercise of constitutional rights.

Reversed.

MR. CHIEF JUSTICE BURGER concurs in the result reached by the Court generally for the reasons set out in the separate opinion of MR. JUSTICE STEWART.

MR. JUSTICE WHITE joins the opinion of the Court insofar as it holds that Congress has not delegated to the President the authority to promulgate the delinquency regulations involved in this case.

APPENDIX TO OPINION OF THE COURT

Under the Selective Service Act of 1917, 40 Stat. 76, if a registrant failed to return his questionnaire or to report for physical examination, he was mailed a special order directing him to report for military service at a specified time. The registrant became a member of the service on the date specified in his order; any refusal to obey that order subjected him to prosecution under military law for desertion. "Since in most instances the delinquent registrant would never receive the order, due to not being in contact with his local board, he would normally acquire the status of a deserter without having any actual knowledge of his induction." Selective Service System, Enforcement of the Selective Service Law 13 (Special Monograph No. 14, 1950). Thus, enforce-

ment of the 1917 Act rested principally with the military, with court-martial being the main weapon of enforcement.

In passing the Selective Training and Service Act of 1940, 54 Stat. 885, Congress specifically ended the practice of subjecting delinquent registrants to military jurisdiction immediately upon receipt of their orders to report. Rather, § 16 of the Act provided that no registrant should be tried in a military court for disobeying selective service laws until he had been actually inducted, vesting criminal jurisdiction until such time in the United States district courts.

No mention was made in the 1940 Act of "delinquency" or "delinquents." These terms were first introduced by the Selective Service regulations issued under the Act, 32 CFR, c. VI (Supp. 1940), which prescribed various duties for registrants and defined a "delinquent" as one who failed to perform them:

"A 'delinquent' is . . . (b) any registrant who prior to his induction into the military service fails to perform at the required time, or within the allowed period of given time, any duty imposed upon him by the selective service law, and directions given pursuant thereto, and has no valid reason for having failed to perform that duty." 32 CFR § 601.106 (Supp. 1940).

Furthermore, the regulations provided definite procedures for processing delinquents: after giving them notice of their suspected delinquency, 23 CFR § 603.389 (Supp. 1940), and after investigating those suspected charges, 32 CFR § 603.390 (Supp. 1940), the Selective Service System provided for two possible dispositions:

On the one hand—

"If the local board is convinced that a delinquent is not innocent of wrongful intent, or if a suspected delinquent does not report to the board within 5 days after the mailing of the Notice of Delinquency . . . , the board should report him to a United States District Attorney for prosecution under section 11 of the Selective Service Act." 32 CFR § 603.391(a) (Supp. 1940).

On the other hand—

"If the board finds that the suspected delinquent is innocent of any wrongful intent, the board shall proceed with him just as if he were never suspected of being a delinquent." 32 CFR § 603.390(a) (Supp. 1940).

The February 1942 amendments to the regulations added a provision by which local boards would advise the United States Attorney in the exercise of his discretion not to prosecute those who had violated the selective service laws:

"If it is determined that the delinquency is not wilful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped." 32 CFR § 642.5 (Cum. Supp. 1938-1943).

This process was called the "enforcement procedure of education and persuasion." Selective Service System, *Enforcement of the Selective Service Law*, *supra*, at 1-3.

"The first steps of the board were to try educating and persuading [the delinquent] to comply, but if such failed his case was referred to the United States attorney for further education and persuasion or if such also failed, for prosecution." Selective Service System Organization and Administration of the System 341 (Special Monograph No. 3, 1951).

If it was determined that the delinquency was "wilful" or that for any reason the United States Attorney should not exercise his discretion not to prosecute, the registrant was given an opportunity to avoid prosecution by "volunteering" for induction.

"[T]he registrant could volunteer for induction from any classification, not just I-A, any time he so desired, and if he was a delinquent under prosecution such volunteering was often allowed from any stage of the proceedings." *Ibid.*

This procedure made it possible for the boards to siphon into military service some delinquents who might otherwise have traveled to jail:

"Since the purpose of the [selective service] laws to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing." Selective Service System, *Legal Aspects of Selective Service* 47 (Rev. 1969).

In November 1943, a new and substantially different set of regulations was issued. These regulations did not rely upon a delinquent's "volunteering" for induction instead they provided for reclassification of deferred or exempted delinquents into classes available for service, 32 CFR § 642.12(a) (Supp. 1943), and provided for their priority induction without regard to the order of call established elsewhere in the regulations, 32 CFR § 542.13(a) (Supp. 1943).

A deferred or exempted registrant who was reclassified into a class available for service was accorded the procedural rights of personal appearance and appeal to which he would otherwise have been entitled, 32 CFR § 642.14(a) (Supp. 1943). In the case of a registrant who was not reclassified as a result of his delinquency, the local board could "reopen" the classification and accord rights of personal appearance and appeal "at any time before induction." 32 CFR § 642.14(b) (Supp. 1943). If the local board determined that the registrant "knowingly became a delinquent," however, it was directed to decline to reopen the registrant's classification. *Ibid.*

With respect to those registrants who were given appeal rights under § 642.14, the appeal board would determine if they had "knowingly" become delinquents. If they had, they were to be retained in a class available for service. If they had not, they were to be "classified on appeal in the usual manner" and their status as delinquents was to be "disregarded." 32 CFR § 642.14(c) (Supp. 1943).

The purpose of these regulations was "to prevent delay in the induction of apprehended delinquent registrants." Selective Service System, Enforcement of the Selective Service Law, *supra*, at 56 (emphasis added). More important, the Service recognized that the procedure had little to do with the statutory exemptions delineated by Congress but, rather, was punitive in nature:

"[T]he Selective Service Regulations concerning delinquents . . . were amended again on November 1, 1943. . . . The purposes of these changes were . . . To provide for the administrative penalty to a delinquent of prompt classification into Classes I-A, I-A-O or IV-E as available for service, in addition to the existing criminal sanction." (*Ibid.*) (Emphasis added.)

The regulation of November 1, 1943, purportedly drew its authority from § 3 of the 1940 Act, 43 Stat. 885. Nothing in that section, however, gives the Service powers of punitive reclassification and accelerated induction. Moreover, to the extent that § 3 has been so construed, it would conflict with the spirit of § 4(a):

"The selection of men for training and service under section 3 . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men *who are liable for such training and service* and who at the time of selection are registered and classified *but not deferred or exempted*." 54 Stat. 887 (emphasis added).

The delinquency provisions under the 1940 Act expired on March 31, 1947. The provisions issued under the 1948 Act are discussed in the text, *supra*.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with the following observations. First, as I see it, nothing in the Court's opinion prevents a selective service board, under the present statute and existing regulations, from classifying as I-A a registrant who fails to provide his board with information essential to the determination of whether he qualifies for a requested exemption or deferment. Section 1622.10 of 32 CFR provides that: "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class." I assume, of course, that under this regulation a board has no authority to keep a registrant classified I-A once it has information that justifies some lower classification.

Second, I think it entirely possible that consistently with our opinion today the President might promulgate new regulations, restricted in application to cases in which a registrant fails to comply with a duty essential to the classification process itself, that provide for accelerated induction under the existing statute. However, in order to avoid those punitive features now found to be unauthorized under existing legislation, any new regulations would have to give to a registrant being subjected to accelerated induction the right (like a person held in civil contempt) to avoid any sanction by future compliance. In other words, while existing legislation does not authorize the use of accel-

ated induction to punish past transgressions, it may will authorize acceleration to encourage a registrant to bring himself into compliance with rules essential to the operation of the classification process.

MR. JUSTICE STEWART, concurring in the judgment.

I do not reach the question whether Congress has authorized the delinquency regulations, because even under the regulations the petitioner's conviction cannot stand. After the petitioner's local board declared him delinquent, he had 30 days as a matter of right to seek a personal appearance before the board and to take an appeal from its ruling. Yet the board gave him no chance to assert either of those rights. Instead, it ordered him to report for induction only five days after it had mailed him a notice of the delinquency declaration.

The local board thus violated the very regulations it purported to enforce. Those provisions seek to induce Selective Service registrants to satisfy their legal obligations by presenting them with the alternative prospect of induction into the armed forces. The personal appearance and appeal are critical stages in the delinquency process. They enable the registrant declared delinquent by his local board to contest the factual premises on which the delinquency declaration rests, to correct his oversight if the breach of duty has arisen merely from neglect, or to purge himself of his delinquency if his violation has been wilful. In any event, the regulatory objective is remedial. The board's authority to reclassify a registrant based on his delinquency and to accelerate his induction is analogous to the age-old power of the courts to pronounce judgments of civil contempt. In each case the subject of the order carries "the keys . . . in [his] own pocket" to the termination of the order's effect.¹

The Government has advanced the civil-contempt analogy, not only in this case, but also in others before the Court both this Term and last.² Such an interpretation of the delinquency regulations comports with the view of the agency charged with their administration—that their purpose is to provide young men for the armed services, not the penitentiaries.³ It comports, as well, with the regulatory scheme itself, under which the local board may reopen its classification of a delinquent registrant without regard to the usual restrictions against such action,⁴ and remove the registrant from delinquency status at any time, even after it has ordered him to report for induction.⁵

¹ Cf. *Shilitani v. United States*, 384 U.S. 364, 368-372; *Green v. United States*, 356 U.S. 165, 197-198 (BLACK, J., dissenting); *Penfield Co. v. SEC*, 330 U.S. 585, 590; *United States v. United Mine Workers*, 330 U.S. 258, 330-332 (BLACK and DOUGLAS, J.J., concurring in part and dissenting in part).

² The Government has spelled out the analogy in its briefs in *Oestereich v. Selective Service Local Bd. No. 11*, 393 U.S. 233; *Breen v. Selective Service Board*, No. 65, O.T. 1969, awaiting decision; *TKroutman v. United States*, No. 623, O.T. 1969, cert. pending; and the present case. See also Griffiths, Punitive Reclassification of Registrants Who Turn in Their Draft Cards, 1 Sel. Serv. L. Rep. 4001, 4010-4012.

³ Selective Service System, Legal Aspects of Selective Service 47 (Rev. 1969).

⁴ 32 CFR § 1642.14(b); cf. 32 CFR § 1625.2.

⁵ 32 CFR § 1642.4(c). Of similar import is the board's authority, before notifying the local United States Attorney that a registrant has failed to report for induction, to wait 30 days if it believes it may be able to locate the registrant and secure his compliance. 32 CFR § 1642.41(a).

The civil-contempt interpretation draws further support from the historical development of the law of Selective Service delinquency. In the First World War, one who failed to fill out his questionnaire was simply inducted into the military, and his failure to report for duty led to a court-martial for desertion. See *United States ex rel. Bergdoll v. Drum*, 107 F.2d 897, 899. By the Second World War, when the precursor of the present delinquency regulations first appeared, 32 CFR §§ 601.106, 603.389-603.393 (Supp. 1940), the law provided compliance procedures for registrants who offered to satisfy their obligations, even after their boards had referred their cases to the United States Attorneys for prosecution. 32 CFR § 642.5 (Cum. Supp. 1938-1943). However, from 1943 on, the regulations required denial of reopenings for knowingly delinquent registrants. 32 CFR § 642.14(b) (Supp. 1943). Under the present regulations even a registrant whose delinquency is wilful may redeem himself before his local board, surely this historical progression demonstrates that whatever may have been the punitive nature of the draft law's initial response to the delinquency problem, its present character is remedial: recalcitrant registrants are handled in civilian rather than military proceedings, and receive an opportunity to recant even where their dereliction has been deliberate.

Such an understanding of the delinquency regulations underlies recent decisions in the federal courts, e.g., *Wills v. United States*, 384 F.2d 943, 945-946, cert. denied, 392 U.S. 908; *United States v. Bruinier*, 293 F. Supp. 666, including those upholding the constitutionality of the regulations, e.g., *Anderson v. Hershey*, 410 F.2d 492, 495-496 n. 10, 498 nn. 15-16, 499, No. 449, cert. pending; cf. *United States v. Branigan*, 299 F. Supp. 225, 236-237; but see *United States v. Eisdorfer*, 299 F. Supp. 975, 984-989, app. docketed, No. 330, O.T. 1960.

Accordingly, even though the regulations seem to say that such reopening and removal lie within the discretion of the local board,⁶ the Government agrees that the board would abuse its discretion if it refused such remedial relief to a registrant who breached his duty inadvertently or carelessly, or who sought to correct the breach, even if originally willful, and to return to compliance with his obligations.⁷ But the Government argues that in this case the petitioner cannot avail himself of these provisions in the delinquency regulations, because he made no effort to correct his delinquency. The fact is that the petitioner's local board never gave him a chance to purge his delinquency. It declared him a delinquent on December 20, 1967, sent him a notice to that effect the next day, and five days later ordered him to report for induction, more than two weeks before the expiration of the petitioner's time to seek a personal appearance or take an appeal.⁸ In these circumstances the petitioner's failure to seek his local board's advice on what he should do, as suggested by the delinquency notice, does not detract from the force of his attack upon the validity of his criminal conviction.⁹

The Government also argues that the petitioner was not prejudiced by the local board's departure from the prescribed regulatory routine because when he was declared delinquent he was already classified I-A. But the Court of Appeals noted that the petitioner's induction date was advanced as a result of the declaration,¹⁰ and the Government concedes that since the petitioner was only 20 years old at the time, it is unlikely that he would have been called at such an early date had he not been declared a delinquent. That the petitioner might eventually have been called—by no means a certainty, given the variations in draft calls and the possibility that he might subsequently have qualified for a deferment or exemption—does not mean he cannot complain that he was ordered to report for induction earlier than he should have been.¹¹

Finally, it is said that the petitioner had no right to a personal appearance before the local board and an appeal from its ruling because its delinquency declaration did not entail his removal into Class I-A from some other category. Since the petitioner was already I-A, the argument runs, his local board never "reclassified" him; it just shifted him from a lower to the highest category within the I-A order of call.¹² Neither logic nor policy supports such a narrow reading of the regulations. Section 1642.14 specifically provides for a personal appearance and appeal, not only upon a "reclassification into" I-A, but also upon a "classification in" that category.¹³ The regulation thus covers precisely those registrants who are already "classified in" Class I-A, and whose declaration of delinquency automatically elevates them to the head of the order of call, as well as those registrants who are not yet in I-A, and who must be "reclassified into" that category before they can be put at the top of the list. The regulation, recognizing that the status of the registrant prior to his being declared delinquent and placed at the head of the order of call is irrelevant to the delinquency process, ensures that all registrants declared delinquent will enjoy the same rights of personal appearance and appeal without regard to their previous status.

Because the challenged regulations afford the petitioner procedural rights that his local board never gave him a chance to exercise, I would reverse the judgment of conviction.

⁶ See 32 CFM §§ 1642.4(c), 1642.14(b).

⁷ The Government qualifies its interpretation by implying that a local board might not abuse its discretion in refusing removal in the case of a registrant who sought in good faith to correct his breach of duty after the board had issued its order to report for induction. But that limitation has no application in the present case, where the local board improperly issued the order to report before the petitioner had a chance to bring himself into compliance. In *Troutman v. United States*, *supra*, where the Solicitor General has conceded that the local board erred in refusing to remove the petitioner's delinquency after he sought to bring himself into compliance with his Selective Service duties, nearly six months intervened between the board's declaration of delinquency that the petitioner sought to cure and its order to report for induction that gave rise to the prosecution for failure to submit to induction.

⁸ 32 CFR §§ 1642.14, 1624.1(a), 1624.2(d), 1626.2(c) (1).

⁹ Cf. *McKart v. United States*, 395 U.S. 185, 197.

¹⁰ 406 F.2d 494, 496.

¹¹ *United States v. Baker*, 416 F.2d 202, 204-205; *Yates v. United States*, 404 F.2d 462, 465-466, rehearing denied, 407 F.2d 50, cert. denied, 395 U.S. 925; *United States v. Smith*, 291 F. Supp. 63, 67-68; *United States v. Lybrand*, 279 F. Supp. 74, 77-83.

¹² See 32 CFR § 1631.7(a).

¹³ Cf. 32 CFR §§ 1642.12, 1642.13.

20. WELSH V. UNITED STATES, 398 U.S. 333 (1970)

MR. JUSTICE BLACK announced the judgment of the Court and delivered an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces in violation of 50 U. S. C. App. § 462(a), and was on June 1, 1966, sentenced to imprisonment for three years. One of petitioner's defenses to the prosecution was that § 6(j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form."¹ After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals, Judge Hamley dissenting, affirmed the conviction. 404 F. 2d 1078 (1968). We granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in *United States v. Seeger*, 380 U.S. 163 (1965). 396 U.S. 816 (1969). For the reasons to be stated, and without passing upon the constitutional arguments that have been raised, we reverse the conviction because of its fundamental inconsistency with *United States v. Seeger*, *supra*.

The controlling facts in this case are strikingly similar to those in *Seeger*. Both Seeger and Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft boards for conscientious objector exemptions from military service under § 6(j) of the Universal Military Training and Service Act. That section then provided, in part:²

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In filling out their exemption applications both Seeger and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." Seeger could sign only after striking the words "training and" and putting quotations marks around the word "religious." Welsh could sign only after striking the words "my religious training and." On those same applications, neither could definitely affirm or deny that he believed in a "Supreme Being," both stating that they preferred to leave the question open.³ But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, small voice of conscience"; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question

¹ 62 Stat. 612. See also 50 U.S.C. App. § 456 (j). The pertinent provision as it read during the period relevant to this case is set out *infra*, at 336.

² 62 Stat. 612. An amendment to the Act of 1967, subsequent to the Court's decision in the *Seeger* case, deleted the reference to a "Supreme Being" but continued to provide that "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a merely personal moral code." 81 Stat. 104, 50 U.S.C. App. § 456(j) (1964 ed., Supp. IV).

³ In his original application in April 1964, Welsh stated that he did not believe in a Supreme Being, but in a letter to his local board in June 1965, he requested that his original answer be stricken and the question left open. App. 29.

about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, "[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions." 404 F. 2d at 1081. But in both cases the Selective Service System concluded that the beliefs of these men were in some sense insufficiently "religious" to qualify them for conscientious objector exemptions under the terms of § 6(j). Seeger's conscientious objector claim was denied "solely because it was not based upon a 'belief in a relation to a Supreme Being' as required by § 6(j) of the Act." *United States v. Seeger*, 380 U.S. 163, 167 (1965), while Welsh was denied the exemption because his Appeal Board and the Department of Justice hearing officer "could find no religious basis for the registrant's beliefs, opinions and convictions." App. 52. Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

In *Seeger* the Court was confronted, first, with the problem that § 6(j) defined "religious training and belief" in terms of a "belief in a relation to a Supreme Being . . .," a definition that arguably gave a preference to those who believed in a conventional God as opposed to those who did not. Nothing the "vast panoply of beliefs" prevalent in our country, the Court construed the congressional intent as being in "keeping with its long-established policy of not picking and choosing among religious beliefs," *id.*, at 175, and accordingly interpreted "the meaning of religious training and belief so as to embrace *all* religions. . . ." *Id.*, at 165. (Emphasis added.) But, having decided that all religious conscientious objectors were entitled to the exemption, we faced the more serious problem of determining which beliefs were "religious" within the meaning of the statute. This question was particularly difficult in the case of Seeger himself. Seeger stated that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." 380 U.S., at 166. In a letter to his draft board, he wrote:

"My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical." 326 F. 2d 846, 848 (1964).

On the basis of these and similar assertions, the Government argued that Seeger's conscientious objection to war was not "religious" but stemmed from "essentially political, sociological, or philosophical views or a merely personal moral code."

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated that "[the] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, *in his own scheme of things*, religious." 380 U.S., at 185. (Emphasis added.) The reference to the registrant's "own scheme of things" was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. The Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of § 6(j) was as follows:

"The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." 380 U.S., at 176.

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that § 6(j) "does not distinguish between externally and internally derived beliefs," *id.*, at 186, and also held that "intensely personal" convictions which some might find "incomprehensible" or "incorrect" come within the meaning of "religious belief" in the Act. *Id.*, at 184-185. What is necessary under Seeger for a registrant's conscientious objection to all war to be "religious" within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of

a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a “religious” conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

Applying this standard to Seeger himself, the Court noted the “compulsion to ‘goodness’” that shaped his total opposition to war, the undisputed sincerity with which he held his views, and the fact that Seeger had “decried the tremendous ‘spiritual’ price man must pay for his willingness to destroy human life.” 380 U.S., at 186–187. The Court concluded:

“We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.” 380 U.S., at 187.

Accordingly, the Court found that Seeger should be granted conscientious objector status..

In the case before us the Government seeks to distinguish our holding in *Seeger* on basically two grounds, both of which were relied upon by the Court of Appeals in affirming Welsh’s conviction. First, it is stressed that Welsh was far more insistent and explicit than Seeger in denying that his views were religious. For example, in filling out their conscientious objector applications, Seeger put quotation marks around the word “religious,” but Welsh struck the word “religious” entirely and later characterized his beliefs as having been formed “by reading in the fields of history and sociology.” App. 22. The Court of Appeals found that Welsh had “denied that his objection to war was premised on religious belief” and concluded that “[t]he Appeal Board was entitled to take him at his word.” 404 F. 2d, at 1082. We think this attempt to distinguish *Seeger* fails for the reason that it places undue emphasis on the registrant’s interpretation of his own beliefs. The Court’s statement in *Seeger* that a registrant’s characterization of his own belief as “religious” should carry great weight, 380 U.S., at 184, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are “religious,” that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word “religious” as used in § 6(j), and accordingly a registrant’s statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were “certainly religious in the ethical sense of the word.” He explained:

“I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed Mr. Bradley [the Department of Justice hearing officer] was using the word ‘religious’ in the conventional sense, and, in order to be perfectly honest did not characterize my belief as ‘religious.’” App. 44.

The Government also seeks to distinguish *Seeger* on the ground that Welsh’s views, unlike Seeger’s, were “essentially political, sociological, or philosophical views or a merely personal moral code.” As previously noted, the Government made the same argument about Seeger, and not without reason, for Seeger’s views had a substantial political dimension. *Supra*, at 338–339. In this case, Welsh’s conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

“I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to ‘defend’ our ‘way of life’ profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility as a *nation*.” App. 30.

We certainly do not think that § 6(j)’s exclusion of those persons with “essentially political, sociological, or philosophical views or a merely personal

moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency. In applying § 6(j)'s exclusion of those whose views are "essentially political, sociological, or philosophical" or to those who have a "merely personal moral code," it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by "religious training and belief." Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal moral code." See *United States v. Seeger*, 380 U.S., at 186.

Welsh stated that he "believe[d] the taking of life—anyone's life—to be morally wrong." App. 44. In his original conscientious objector application he wrote the following:

"I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant." App. 10.

Welsh elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them "with the strength of more traditional religious convictions," 404 F. 2d, at 1081, we think Welsh was clearly entitled to a conscientious objector exemption. Section 6(j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring in the result.

Candor requires me to say that I joined the Court's opinion in *United States v. Seeger*, 380 U.S. 163 (1965), only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge.¹

In *Seeger* the Court construed § 6(j) of the Universal Military Training and Service Act so as to sustain a conscientious objector claim not founded on a theistic belief. The Court, in treating with the provision of the statute that limited conscientious objector claims to those stemming from belief in "a Supreme Being," there said: "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views," and held that the test of belief "'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 380 U.S., at 165-166. Today the prevailing opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption. The prevailing opinion now says: "If an individual deeply and sincerely holds beliefs that are *purely ethical or moral* in source and content but that nevertheless impose upon him a duty of conscience to re-

¹For a discussion of those principles that determine the appropriate scope for the doctrine of *stare decisis*, see *Moragne v. States Marine Lines*, also decided today, *post*, p. 375; *Boys Markets v. Retail Clerks Union*, *ante*, p. 235; *Helvering v. Hallock*, 309 U.S. 106 (1940).

frain from participating in any war at any time" (emphasis added), he qualifies for a § 6(j) exemption.

In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in *Seeger*, and even more apparently I have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether § 6(j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by MR. JUSTICE BLACK, not as matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

I

Section 6(j) provided during the period relevant to this case:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." Universal Military Training and Service Act of 1948, § 6(j), 62 Stat. 612, 50 U. S. C. App. § 456(j).

The issue is then whether Welsh's opposition to war is founded on "religious training and belief" and hence "belief in a relation to a Supreme Being" as Congress used those words. It is of course true that certain words are more plastic in meaning than others. "Supreme Being" is a concept of theology and philosophy, not a technical term, and consequently may be, in some circumstances, capable of bearing a contemporary construction as notions of theology and philosophy evolve. Compare *United States v. Storrs*, 272 U.S. 652 (1926). This language appears, however, in a congressional enactment: it is not a phrase of the Constitution, like "religion" or "speech," which this Court is freer to construe in light of evolving needs and circumstances. Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952), and my concurring opinion in *Estes v. Texas*, 381 U.S. 532, 595-596 (1965), and my opinion concurring in the judgment in *Garner v. Louisiana*, 368 U. S. 157, 185 (1961). Nor is it so broad a statutory directive, like that of the Sherman Act, that we may assume that we are free to adopt and shape policies limited only by the most general statement of purpose. Cf., e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). It is Congress' will that must here be divined. In that endeavor it is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also un contemplated by the legislature in order to achieve the legislative policy. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892): it is a wholly different matter to define words so as to change policy. The limits of this Court's mandate to stretch concededly elastic congressional language are fixed in all cases by the context of its usage and legislative history, if available, that are the best guides to congressional purpose and the lengths to which Congress enacted a policy. *Rosado v. Wyman*, 397 U.S. 397 (1970).² The prevailing opinion today snubs both guidelines for it is ap-

² The difference is between the substitution of judicial judgment for a principle that is set forth by the Constitution and legislature and the application of the legislative principle to a new "form" that is no different in substance from the circumstances that existed when the principle was set forth. Cf. *Katz v. United States* 389 U.S. 347 (1967). As the Court said in *Weems v. United States*, "Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken . . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. 349, 373 (1910) (emphasis added).

While it is by no means always simple to discern the difference between the residual principle in legislation that should be given effect in circumstances not covered by the express statutory terms and the limitation on that principle inherent in the same words, the Court in *Seeger* and the prevailing opinion today read out language that, in my view, plainly limits the principle rather than illustrates the policy and circumstances that were in mind when § 6 (j) was enacted.

parent from a textual analysis of § 6(j) and the legislative history that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.

A

The natural reading of § 6(j), which quite evidently draws a distinction between theistic and nontheistic religions, is the only one that is consistent with the legislative history. Section 5(g) of the 1940 Draft Act exempted individuals whose opposition to war could be traded to "religious training and belief." 54 Stat. 889, without any allusion to a Supreme Being. In *United States v. Kauten*, 133 F. 2d 703 (C.A. 2d Cir. 1943), the Second Circuit, speaking through Judge Augustus Hand, broadly construed "religious training and belief" to include a "belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." 133 F. 2d, at 708. The view was further elaborated in subsequent decisions of the Second Circuit, see *United States ex rel. Phillips v. Downer*, 135 F. 2d 521 (C.A. 2d Cir. 1943); *United States ex rel. Reel v. Badt*, 141 F. 2d 845 (C.A. 2d Cir. 1944). This expansive interpretation of § 5(g) was rejected by a divided Ninth Circuit in *Berman v. United States*, 156 F. 2d 377, 380-381 (1946):

"It is our opinion that the expression 'by reason of religious training and belief' . . . was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.

* * * * *

"[I]n *United States v. Macintosh*, 283 U.S. 605 . . . Mr. [Chief] Justice Hughes in his dissent . . . said: 'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.' " The unmistakable and inescapable thrust of the *Berman* opinion, that religion is to be conceived in theistic terms, is rendered no less straightforward by the court's elaboration on the difference between beliefs held as a matter of moral or philosophical conviction and those inspired by religious upbringing and adherence to faith.

"There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute. It is said in *State v. Amara Society*, 132 Iowa 304, 109 N. W. 894, 898 . . . : 'Surely a scheme of life designed to obviate such results (man's inhumanity to man), and by removing temptations, and all the inducements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion *when its devotee regards it as an essential tenet of their [sic] religious faith.*' " (Emphasis of Court of Appeals.) *Ibid.*

In the wake of this intercourt dialogue, crystallized by the dissent in *Berman* which espoused the Second Circuit interpretation in *Kauten*, *supra*, Congress enacted § 6(j) in 1948. That Congress intended to anoint the Ninth Circuit's interpretation of § 5(g) would seem beyond question in view of the similarity of the statutory language to that used by Chief Justice Hughes in his dissenting opinion in *Macintosh* and quoted in *Berman* and the Senate report. The first half of the new language was almost word for word that of Chief Justice Hughes in *Macintosh*, and quoted by the *Berman* majority;³ and the Senate Committee report adverted to *Berman*, thus foreclosing any possible

³ The substitution in § 6(j) of "Supreme Being" instead of "God" as used in *Macintosh* does not, in my view, carry the burden, placed on it in the *Seeger* opinion, of demonstrating that Congress "deliberately broadened" Chief Justice Hughes definition. "God" and "Supreme Being" are generally taken as synonymous terms meaning Deity. It is common practice to use various synonyms for the Deity. The Declaration of Independence refers to "Nature's God," "Creator," "Supreme Judge of the world," and "divine Providence." References to the Deity in preambles to the state constitutions include, for example, and use interchangeably "God," "Almighty God," "Supreme Being." A. Stokes & L. Pfeffer, Church and State in the United States 561 (1964). In *Davis v. Beason*, 133 U.S. 333, 342 (1890), the Court spoke of man's relations to his "Creator" and to his Maker"; in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), and *Engel v. Vitale*, 370 U.S. 421, 424 (1962), to the "Almighty."

speculation as to whether Congress was aware of the possible alternatives. The report stated:

"This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and non-combatant military service. (See *United States v. Berman* [sic], 156 F. (2d) 377 certiorari denied, 329 U.S. 795.)" S. Rep. No. 1268, 80th Cong., 2d Sess., 14.⁴

B

Against this legislative history it is a remarkable feat of judicial surgery to remove, as did *Seeger*, the theistic requirement of § 6(j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from "essentially political, sociological, or philosophical views or a merely personal moral code."

In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress. Resort to Webster's reveals that the meanings of "religion" are:⁵ "1. The service and adoration of God or a god as expressed in forms of worship, in obedience to divine commands . . . ; 2. The state of life of a religious . . . ; 3. One of the *systems* of faith and worship; a form of theism; a religious faith . . . ; 4. The profession or practice of religious beliefs; religious observances *collectively*; *pl.* rites; 5. Devotion or fidelity; . . . conscientiousness; 6. An apprehension, awareness, or conviction of the existence of a supreme being, or more widely, of supernatural powers or influences controlling one's own, humanity's, or nature's destiny; also, such an apprehension, etc., accompanied by or arousing reverence, love, gratitude, the will to obey and serve, and the like . . ." (Emphasis added.)

Of the five pertinent definitions four include the notion of either a Supreme Being or a cohesive, organized group pursuing a common spiritual purpose together. While, as the Court's opinion in *Seeger* points out, these definitions do not exhaust the almost infinite and sophisticated possibilities for defining "religion," there is strong evidence that Congress restricted, in this instance, the word to its conventional sense. That it is difficult to plot the semantic penumbra of the word "religion" does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements. It must be recognized that the permissible shadow of connotation is limited by the context in which words are used. In § 6(j) Congress had included not only a reference to a Supreme Being but has also explicitly contrasted "religious" beliefs with those that are "essentially political, sociological, or philosophical" and a "personal

⁴ The *Seeger* opinion relies on the absence of any allusion to the judicial conflict to partly the thrust of the legislative history and assigns significance to the Committee citation of *Berman* as manifestation of its intention to reenact § 5 (g) of the 1940 Act, and also as authority for the exclusion of those who beliefs are grounded in secular ethics. The citation to *Berman* would not be conclusive of congressional purpose if Congress had simply reenacted the 1940 Act adding only the express exclusion in the last clause. But the reasoning in *Seeger* totally ignores the fact that Congress without other apparent reason added the "Supreme Being" language of the *Berman* majority in the facet of the *Berman* dissent which espoused Judge Hand's view in *Kauten*. The argument in *Seeger* is not, moreover, strengthened by the fact that Congress in drafting the 1948 Selective Service laws placed great weight on the views of the Selective Service System which, the Court suggested, did not view *Berman* and *Kauten* as being in conflict. 380 U.S., at 179. The Selective Service System Monograph No. 11, Conscientious Objection (1950) was not before Congress when § 6 (j) was enacted and the fact that the Service relied on both *Kauten* and *Berman* for the proposition that conscientious objection must emanate from a religious and not a secular source, does not mean that it considered the Supreme Being discussion in *Berman* as surplusage.

⁵ New International Dictionary, Unabridged (2d ed. 1934).

moral code." This exception certainly is, at the very least, the statutory boundary, the "asymptote," of the word "religion."⁶

For me this dichotomy reveals that Congress was not embracing that definition of religion that alone speaks in terms of "devotion or fidelity" to individual principles acquired on an individualized basis but was adopting, at least, those meanings that associate religion with formal organized worship or shared beliefs by a recognizable and cohesive group. Indeed, this requirement was explicit in the predecessor to the 1940 statute. The Draft Act of 1917 conditioned conscientious objector status on membership or affiliation with a "well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles forb[ade] its members to participate in war in any form" § 4, 40 Stat 78. That § 5(g) of the 1940 Act eliminated the affiliation and membership requirement does not, in my view, mean as the Court, in effect, concluded in *Seeger* that Congress was embracing a secular definition of religion.⁷

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.

II

When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost.

I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are unconstitutional, but it is not permissible, in my judgment, to take a lat-

⁶The prevailing opinion's purported recognition of this distinction slides over the "personal moral code" exception, in § 6 (j). Thus that opinion in concluding that § 6 (j) does not exclude "those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to be a substantial extent upon considerations of public policy" but excludes individuals, whose beliefs are not deeply held, and those whose objection to war does not rest upon "moral, ethical, or religious principle," but instead rests solely upon considerations of "policy, pragmatism, or expediency," *ante*, at 342-343, blends morals and religion, two concepts that Congress chose to keep separate.

⁷The apparent purpose of the 1940 change in language was to eliminate membership as a decisive criterion in recognition of the fact that mere formal affiliation is no measure of the intensity of beliefs, and that many nominal adherents do not share or pursue the ethics of their church. That the focus was made the conscientiousness of the individual's own belief does not mean that Congress was indifferent to its source. Were this the case there would have been no occasion to allude to "religious training" in the 1940 enactment, and to contrast it with secular ethics in the 1948 statute. Yet the prevailing opinion today holds that "beliefs that are purely ethical," no matter how acquired, qualify the holder for § 6 (j) status if they are held with the requisite intensity.

However, even the providing opinion's ambulatory concept of "religion" does not suffice to embrace Welsh, since petitioner insisted that his beliefs had been formed "by reading in the fields of history and sociology" and "denied that his objection to war was premised on religious belief." 404 F. 2d, at 1082. That opinion not only establishes a definition of religion that amounts to "Newspeak" but it refuses to listen to petition who is speaking the same language.

eral step that robs legislation of all meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution. Compare *Yates v. United States*, 354 U.S. 298 (1957). As the Court stated in *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964):

"It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it. *Scales v. United States* [367 U.S. 203, 211]. To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."

The issue comes sharply into focus in Mr. Justice Cardozo's statement for the Court in *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933):

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' . . . But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed to distinctly to permit us to ignore it because of mere misgiving as to power. The problem must be faced and answered."

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional. Compare, e.g., *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *United States v. Reese*, 92 U.S. 214 (1876), with *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Nat. Life Ins. Co. v. United States*, 277 U.S. 508 (1928). I therefore turn to the constitutional question.

III

The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors. Such a course would be wholly "neutral" and, in my view, would not offend the Free Exercise Clause, for reasons set forth in my dissenting opinion in *Sherbert v. Verner*, 374 U.S. 398, 418 (1963). See *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (dictum); cf. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Davis v. Beacon*, 133 U.S. 333 (1890); *Hamilton v. Board of Regents*, 293 U.S. 245, 264-265 (1934); *Reynolds v. United States*, 98 U.S. 145 (1879); Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1 (1961). However, having chosen to exempt, it cannot draw the line between theistic or non-theistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. See my separate opinion in *Waltz v. Tax Comm'n*, 397 U.S. 664, 694 (1970); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School District of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). The implementation of the neutrality principle of these cases requires, in my view, as I stated in *Waltz v. Tax Comm'n*, *supra*, "an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included]." 397 U.S., at 696.

The "radius" of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its "scope" individuals motivated by teachings of nontheistic religions,⁸ and individuals guided by an inner ethical voice that bespeaks secular and not "religious" reflection. It not only accords a preference to the "religious" but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned. See my separate opinion in *Waltz v. Tax Comm'n.*, *supra*; *School District of Abington Township v. Schempp* (Goldberg, J., concurring), *supra*; *Engel v. Vitale*, *supra*; *Torcaso v. Watkins*, *supra*.

If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source.⁹ The common denominator must be the intensity of moral conviction with which a belief is held.¹⁰ Common experience teaches that among "religious" individuals some are weak and other strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations.

The Government enlists the *Selective Draft Law Cases*, 245 U.S. 366 (1918), as precedent for upholding the constitutionality of the religious conscientious objector provision. That case involved the power of Congress to raise armies by conscription and only incidentally the conscientious objector exemption. The language emphasized by the Government to the effect that the exemption for religious objectors and ministers constituted neither an establishment nor interference with free exercise of religion can only be considered an afterthought since the case did not involve any individuals who claimed to be non-religious conscientious objectors.¹¹ This conclusory assertion, unreasoned and unaccompanied by citation, surely cannot foreclose consideration of the question in a case that squarely presents the issue.

⁸ This Court has taken notice of the fact that recognized "religions" exist that "do not teach what would generally be considered a belief in the existence of God." *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11, e.g., "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Ibid.* See also *Washington Ethical Society v. District of Columbia*, 101 U.S. App. D. C. 371, 249 F. 2d 127 (1957); 2 *Encyclopaedia of the Social Sciences* 293; J. Archer, *Faiths Men Live By* 120-138, 254-313 (2d ed. revised by Purinton 1958); Stokes & Pfeffer, *supra*, n. 3, at 560.

⁹ In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held unconstitutional over my dissent a state statute that conditioned eligibility for unemployment benefits on being "able to work and . . . available for work" and further provided that a claimant was ineligible "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . ." This, the Court held, was a violation of the Free Exercise Clause as applied to Seventh Day Adventists whose religious background forced them as a matter of conscience to decline Saturday employment. My own conclusion, to which I still adhere, is that the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group. I suggested, however, that a State could constitutionally create exceptions to its program to accommodate religious scruples. That suggestion must, however, be qualified by the observation that any such exception in order to satisfy the Establishment Clause of the First Amendment, would have to be sufficiently broad to be religiously neutral. See my separate opinion in *Waltz v. Tax Comm'n.*, *supra*. This would require creating an exception for anyone who, as a matter of conscience, could not comply with the statute. Whether, under a statute like that involved in *Sherbert*, it would be possible to demonstrate a basis in conscience for not working Saturday is quite another matter.

¹⁰ Without deciding what constitutes a definition of "religion" for First Amendment purposes it suffices to note that it means, in my view, at least the two conceivable readings of § 6 (j) set forth in Part II, but something less than mere adherence to ethical or moral beliefs in general or a certain belief such as conscientious objection. Thus the prevailing opinion's expansive reading of "religion" in § 6 (j) does not, in my view, create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, e.g., those who object to war on pragmatic grounds and contend that pragmatism is their creed.

¹¹ Thus, Mr. Chief Justice White said:

"And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more." 245 U.S., at 389-390.

Other authorities assembled by the Government, far from advancing its case, demonstrate the unconstitutionality of the distinction drawn in § 6(j) between religious and nonreligious beliefs. *Everson v. Board of Education*, 330 U.S. 1 (1947), the *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, and 617 (1961), and *Board of Education v. Allen*, 392 U.S. 236 (1968), all sustained legislation on the premise that it was neutral in its application and thus did not constitute an establishment, notwithstanding the fact that it may have assisted religious groups by giving them the same benefits accorded to nonreligious groups.¹² To the extent that *Zorach v. Clauson*, 343 U.S. 306 (1952), and *Sherbert v. Verner*, *supra*, stand for the proposition that the Government may (*Zorach*), or must (*Sherbert*), shape its secular programs to accommodate the beliefs and tenets of religious groups, I think these cases unsound.¹³ See generally Kurland, *supra*. To conform with the requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral. See my separate opinion in *Waltz v. Tax Comm'n*, *supra*.

IV

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931).¹⁴

The appropriate disposition of this case, which is a prosecution for refusing to submit to induction and not an action for a declaratory judgment on the constitutionality of § 6(j), is determined by the fact that at the time of Welsh's induction notice and prosecution the Selective Service was, as required by statute, exempting individuals whose beliefs were identical in all respects to those held by petitioner except that they derived from a religious source. Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of

¹² My Brother WHITE in dissent misinterprets, in my view, the thrust of Mr. Justice Frankfurter's language in the *Sunday Closing Law Cases*. See *post*, at 369. Section 6(j) speaks directly to belief divorced entirely from conduct. It evinces a judgment that individuals who hold the beliefs set forth by the statute should not be required to bear arms, and the statutory belief that qualifies is only a religious belief. Under these circumstances I fail to see how this legislation has "any substantial legislative purpose" apart from honoring the conscience of individuals who oppose war on only religious grounds. I cannot, moreover, accept the view, implicit in the dissent, that Congress has any ultimate responsibility for construing the Constitution. It, like all other branches of government, is constricted by the Constitution and must conform its action to it. It is this Court, however, and not the Congress that is ultimately charged with the difficult responsibility of construing the First Amendment. The Court has held that universal conscription creates no free exercise problem, see cases cited, *supra*, at 356, and Congress can constitutionally draft individuals notwithstanding their religious beliefs. Congress, whether in response to political considerations or simply out of sensitivity for men of religious conscience, can of course decline to exercise its power to conscript to the fullest extent, but it cannot do so without equal regard for men of nonreligious conscience. It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own. Any view of the Free Exercise Clause that does not insist on this neutrality would engulf the Establishment Clause and render it vestigial.

¹³ That the "released-time" program in *Zorach* did not utilize classroom facilities for religious instruction, unlike *McCullum v. Board of Education*, 333 U.S. 203 (1948), is a distinction for me without Establishment Clause substance. At the very least the Constitution requires that the State not excuse students early for the purpose of receiving religious instruction when it does not offer to nonreligious students the opportunity to use school hours for spiritual or ethical instruction of a nonreligious nature. Moreover, whether a released-time program cast in terms of improving "conscience" to the exclusion of artistic or cultural pursuits, would be "neutral" and consistent with the requirement of "voluntarism," is by no means an easy question. Such a limited program is quite unlike the broad approach of the tax exemption statute, sustained in *Waltz v. Tax Comm'n*, *supra*, which included literary societies, playgrounds, and associations "for the moral or mental improvement of men."

¹⁴ See *Skinner v. Oklahoma*, where MR. JUSTICE DOUGLAS, in an opinion holding infirm under the Equal Protection Clause, a state statute that required sterilization of habitual thieves who perpetrated larcenies but not those who engaged in embezzlement, noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment.

the First Amendment unless Welsh is to go remediless. Cf. *Iowa-Des Moines National Bank v. Bennett*, *supra*; *Smith v. Cahoon*, 283 U.S. 553 (1931).¹⁵

This result, while tantamount to extending the statute, is not only the one mandated by the Constitution in this case but also the approach I would take had this question been presented in an action for a declaratory judgment or "an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope." *Smith v. Cahoon*, 283 U.S., at 565.¹⁶ While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Indicative of the breadth of the judicial mandate in this regard is the broad severability clause, 65 Stat. 88, which provides that "[i]f any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby." While the absence of such a provision would not foreclose the exercise of discretion in determining whether a legislative policy should be repaired or abandoned, cf. *United States v. Jackson*, 390 U.S. 570, 585 n. 27 (1968), its existence "discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what

¹⁵ In *Iowa-Des Moines National Bank v. Bennett*, Mr. Justice Brandeis speaking for the Court in a decision holding that the State had denied petitioners equal protection of the laws by taxing them more heavily than their competitors, observed that: "The right invoked is that to equal treatment: and such treatment will be attained if either their competitors' taxes are increased or their own reduced." 284 U.S., at 247. Based on the impracticality of requiring the aggrieved taxpayer at that stage to "assume the burden of seeking an increase of the taxes which . . . others should have paid," the Court held that petitioner was entitled to recover the overpayment.

The Establishment Clause case that comes most readily to mind as involving "under-inclusion" is *Epperson v. Arkansas*, 393 U.S. 97 (1968). There the State prohibited the teaching of evolutionist theory but "did not seek to excise from the curricula of its schools and universities all discussion of the origin of man." 393 U.S., at 109. The Court held the Arkansas statute, which was framed as a prohibition, unconstitutional. Since the statute authorized no positive action, there was no occasion to consider the remedial problem. Cf. *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Most of the other cases arising under the Establishment Clause have involved instances where the challenged legislation conferred a benefit on religious as well as secular institutions. See, e.g., *Waltz v. Tax Comm'n*, *supra*; *Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, *supra*. These cases, had they been decided differently, would still not have presented the remedial problem that arises in the instant case, for they were cases of alleged "overinclusion." The school prayer cases, *School District of Abington Township v. Schempp*, *supra*; and *Engel v. Vitale*, *supra*; and the released-time cases, *Zorach v. Clauson*, *supra*; *McCollum v. Board of Education*, 333 U.S. 203 (1948), also failed to raise the remedial issue. In the school prayer situation the requested relief was an injunction against the saying of prayers. Moreover it is doubtful that there is any analogous secular ritual that could be performed so as to satisfy the neutrality requirement of the First Amendment and even then the practice of saying prayers in schools would still offend the principle of voluntarism that must be satisfied in First Amendment cases. See my separate opinion in *Waltz v. Tax Comm'n*, *supra*. The same considerations prevented the issue from arising in the one released-time program case that held the practice unconstitutional.

In *McCollum*, where the Court held unconstitutional a program that permitted "religious teachers, employed by private religious groups . . . to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law," 333 U.S., at 205, the relief requested was an order to mandamus the authorities to discontinue the program. No question arose as to whether the program might have been saved by extending a similar privilege to other students who wished extracurricular instruction in, for example, atheistic or secular ethics and morals. Cf. my separate opinion in *Waltz v. Tax Comm'n*, *supra*. Moreover as in the prayer cases, since the defect in the Illinois program was not the mere absence of neutrality but also the encroachment on "voluntarism," see *ibid.*, it is doubtful whether there existed any remedial alternative to voiding the entire program. A further complication would have arisen in these cases by virtue of the more limited discretion this Court enjoys to extend a policy for the States even as a constitutional remedy. Cf. *Skinner v. Oklahoma*, *supra*; *Morey v. Doud*, 354 U.S. 457 (1957); *Dorchy v. Kansas*, 264 U.S. 286 (1924).

¹⁶ As long as the Selective Service continues to grant exemptions to religious conscientious objectors, individuals like petitioner are not required to submit to induction. This is tantamount to extending the present statute to cover those in petitioner's position. Alternatively the defect of underinclusion that renders this statute unconstitutional could be cured in a civil action by eliminating the exemption accorded to objectors whose beliefs are founded in religion. The choice between the two courses is not one for local draft boards nor is it one that should await civil litigation where the question could more appropriately be considered. Consequently I deem it proper to confront the issue here, even though, as a technical matter, no judgment could issue in this case ordering the Selective Service to refrain entirely from granting exemptions.

remained. . . ." *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 235 (1932). See also *Skinner v. Oklahoma*, *supra*; *Nat. Life Ins. Co. v. United States*, 277 U.S. 508 (1928).¹⁷

In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation. Cf. *Nat. Life Ins. Co. v. United States*, *supra* (Brandeis, J., dissenting); *Dorchy v. Kansas*, 264 U.S. 286 (1924).

The policy of exempting religious conscientious objectors is one of long-standing tradition in this country and accords recognition to what is, in a diverse and "open" society, the important value of reconciling individuality of belief with practical exigencies whenever possible. See *Girouard v. United States*, 328 U.S. 61 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton v. Board of Regents*, 293 U.S., at 267; *Macintosh v. United States*, 42 F. 2d 845, 847 (1930). That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.¹⁸ Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of under-inclusion in § 6(j) and can be administered by local boards in the usual course of business.¹⁹ Like the prevailing opinion, I also

¹⁷ In *Skinner* the Court impliedly recognized the mandate of flexibility to repair a defective statute—even by extension—conferred by a broad severability clause. As already noted, the Court there declined to exercise discretion, however, since absent a clear indication of legislative preference it was for the state courts to determine the proper course.

While Mr. Justice Brandeis in a dissenting opinion in *Nat. Life Ins. Co.*, *supra*, at 522, 534-535, expressed the view that a severability clause in terms like that before us now is not intended to authorize amendment by expanding the scope of legislation, his remarks must be taken in the context of a dissent to a course he deemed contrary that Congress would have chosen. Thus, after quoting *Hill v. Wallace*, 259 U.S. 44, 71 (1922), to the effect that a severability clause "furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part [but . . . does not give . . . power to amend the act," Justice Brandeis observed, that: "Even if such a clause could ever permit a court to enlarge the scope of a deduction allowed by a taxing statute, . . . the asserted unconstitutionality can be cured as readily by [excision] as by [enlargement]" and that the former would most likely have been the congressional preference in that particular case. Cf. *Iowa-Des Moines National Bank v. Bennett*, *supra*.

¹⁸ I reach these conclusions notwithstanding the admonition in *United States v. Reese* that it "is no part of [this Court's] duty" "[t]o limit [a] statute in [such a way as] to make a new law, [rather than] enforce an old one," 92 U.S. 214, 221 (1876). See also *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Marchetti v. United States*, 390 U.S. 39, 60 (1968). Neither of these cases involved statutes evincing a congressional intent to confer a benefit on a particular group, thus requiring the frustration of third-party beneficiary legislation when the acts were held invalid. Moreover, the saving construction in *Marchetti* would have thwarted, not complemented, the primary purpose of the statute by introducing practical difficulties into that enforcement of state gambling laws that the statute was designed to further.

¹⁹ During World War I when the exemption was granted to members or affiliates of "well-recognized religious sect[s]" the Selective Service System found it impracticable to compile a list of "recognized" sects and left the matter to the discretion of the local boards. Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918, p. 56. As a result, some boards treated religious and nonreligious objectors in the same manner. Report of the Provost Marshal General to the Secretary of War on the First Draft Under the Selective-Service Act, 1917, p. 59. Finally, by presidential regulation dated March 20, 1918, it was ordered that conscientious objector status be open to all conscientious objectors without regard to any religious qualification. The experience during World War II, when draft boards were operating under the broad definition of religion in *United States v. Kauten*, 133 F.2d 703 (C.A. 2d Cir. 1943), also demonstrates the administrative viability of today's test. Not only would the test announced today seem manageable but it would appear easier than the arcane inquiry required to determine whether beliefs are religious or secular in nature.

conclude that petitioner's beliefs are held with the required intensity and consequently vote to reverse the judgment of conviction.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

Whether or not *United States v. Seeger*, 380 U.S. 163 (1965), accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objections to war, I cannot join today's construction of § 6(j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology. Our obligation in statutory construction cases is to enforce the will of Congress, not our own; and as MR. JUSTICE HARLAN has demonstrated, constructing § 6(j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me that conclusion should end this case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not § 6(j) is constitutional, Welsh had no First Amendment excuses for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.

If the Constitution expressly provided that aliens should not be exempt from the draft, but Congress purported to exempt them and no others, Welsh, a citizen, could hardly qualify for exemption by demonstrating that exempting aliens is unconstitutional. By the same token, if the Constitution prohibits Congress from exempting religious believers, but Congress exempts them anyway why should the invalidity of the exemption create a draft immunity for Welsh? Surely not just because he would otherwise go without a remedy along with all those others not qualified for exemption under the statute. And not as a reward for seeking a declaration of the invalidity of § 6(j); for as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if § 6(j) would present no First Amendment problems if it had included Welsh and others like him. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). Nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war. Saving § 6(j) by extending it to include Welsh cannot be done in the name of a presumed congressional will but only by the Court's taking upon itself the power to make draft-exemption policy.

If I am wrong in thinking that Welsh cannot benefit from invalidation of § 6(j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, § 6(j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion. As MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN, said in a separate opinion in the *Sunday Closing Law Cases*, 366 U.S. 420, 468 (1961), an establishment contention "can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear. See *Selective Draft Law Cases*, 245 U.S. 366."

Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because in view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. True, this Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers. *Hamilton v. Regents*, 293 U.S. 245, 263-264 (1934); *United States v. Macintosh*, 283 U.S.

605, 623-624 (1931). But this Court is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task. Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh*, *supra*, at 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are "indicative of the actual operation of the principles of the Constitution." However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

If there were no statutory exemption for religious objectors to war and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner*, 374 U.S. 398 (1963), or the exemption from the flat tax on book sellers held required for evangelists, *Follett v. McCormick*, 321 U.S. 573 (1944). Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establishment if camouflaged by granting additional exemptions for nonreligious, but "moral" objectors to war.

On the assumption, however, that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service, it does not follow that § 6(j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that § 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power "To raise and support Armies" and "To make all Laws which shall be necessary and proper for carrying into Execution" that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore—surely "necessary and proper"—in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause. If this was the course Congress took, then just as in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), where we accepted the judgment of Congress as to what legislation was appropriate to enforce the Equal Protection Clause of the Fourteenth Amendment, here we should respect congressional judgment accommodating the Free Exercise Clause and the power to raise armies. This involves no surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution. But it was enough in *Katzenbach* "to perceive a basis upon which the Congress might resolve the conflict as it did," 384 U.S., at 653, and plainly in the case before us there is an arguable basis for § 6(j) in the Free Exercise Clause since, without the exemption, the law would compel some members of the public to engage in combat operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment. *United States v. Nisson*, 297 F. Supp. 902 (1969). There being substantial roots in the Free Exercise Clause for § 6(j) I would not frustrate congressional will by construing the Establishment Clause to condition the ex-

emption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.

We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality" and not "inhibition" of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech. "[I]t safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Although socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but that may be forbidden to others. See *United States v. Ballard*, 322 U.S. 78 (1944); *Follet v. McCormick*, 321 U.S. 573 (1944). We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961) and *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961), a majority of the Court rejected claims that Sunday closing laws placed unacceptable burdens on Sabbatarians' religious observances. It was not suggested, however, that the Sunday closing law in 21 States exempting Sabbatarians and others violated the Establishment Clause because no provision was made for others who claimed nonreligious reasons for not working on some particular day of the week. Nor was it intimated in *Zorach v. Clauson*, 343 U.S. 306 (1952), that the no-establishment holding might be infirm because only those pursuing religious studies for designated periods were released from the public school routine; neither was it hinted that a public school's refusal to institute a released-time program would violate the Free Exercise Clause. The Court in *Sherbert v. Verner*, *supra*, construed the Free Exercise Clause to require special treatment for Sabbatarians under the State's unemployment compensation law. But the State could deal specially with Sabbatarians whether the Free Exercise Clause required it or not, for as MR. JUSTICE HARLAN then said—and I agreed with him—the Establishment Clause would not forbid an exemption for Sabbatarians who otherwise could not qualify for unemployment benefits.

The Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion that otherwise might be consistent with the Free Exercise Clause. But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.

I would affirm the judgment below.

21. SELECTIVE SERVICE AMENDMENTS OF 1971 (P.L. 92-129, 92D CONG.
1ST SESS.)



Public Law 92-129
92nd Congress, H. R. 6531
September 28, 1971

An Act

To amend the Military Selective Service Act of 1967; to increase military pay; to authorize military active duty strengths for fiscal year 1972; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—AMENDMENTS TO THE MILITARY SELECTIVE SERVICE ACT OF 1967; RELATED PROVISIONS

Military Selective Service Act of 1967, amendments.

SEC. 101. (a) The Military Selective Service Act of 1967, as amended, is amended as follows:

(1) Section 1(a) is amended to read as follows:

“(a) This Act may be cited as the ‘Military Selective Service Act’.”

(2) Section 3 is amended to read as follows:

“SEC. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.”

65 Stat. 75;
81 Stat. 100.
50 USC app. 451.
Redesignation.
Registration.
65 Stat. 76.
50 USC app. 453.

(3) The first two paragraphs of section 4(a) are amended to read as follows:

Induction.
50 USC 454.

“Except as otherwise provided in this title, every person required to register pursuant to section 3 of this title who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6(h) of this title, shall be liable for training and service in the Armed Forces of the United States: *Provided*, That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: *Provided further*, That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

Post, p. 350.

“At such time as the period of active service in the Armed Forces required under this title of persons who have not attained the nineteenth anniversary of the day of their birth has been reduced or eliminated pursuant to the provisions of section 4(k) of this title, and except

95 STAT. 348
85 STAT. 349

65 Stat. 80;
80 Stat. 656.

Post, p. 350.

81 Stat. 102.
50 USC app.
456.

65 Stat. 77.
50 USC app.
454.

70A Stat. 630.

62 Stat. 607.

76 Stat. 525.

Aliens, resi-
dency require-
ment.

65 Stat. 83;
83 Stat. 220,
972.
50 USC app. 455.

Induction
limitation.

Aliens,
occupational
deferment.
81 Stat. 101.
50 USC app.
456.

85 STAT. 349
85 STAT. 350
66 Stat. 218.
8 USC 1257.

Ante, p. 348.

as otherwise provided in this title, every person who is required to register under this title and who has not attained the nineteenth anniversary of the day of his birth on the date such period of active service is reduced or eliminated or who is otherwise liable as provided in section 6(h) of this title, shall be liable for training in the National Security Training Corps: *Provided*, That persons deferred under the provisions of section 6 of this title shall not be relieved from liability for induction into the National Security Training Corps solely by reason of having exceeded the age of nineteen years during the period of such deferment. The President is authorized, from time to time, whether or not a state of war exists, to select and induct for training in the National Security Training Corps as hereinafter provided such number of persons as may be required to further the purposes of this title."

(4) The fourth paragraph of section 4(a) is amended by striking out "Secretary of the Treasury" and inserting in lieu thereof "Secretary of Transportation".

(5) Section 4(b) is amended by striking out "Secretary of the Treasury" each time it appears and inserting in lieu thereof "Secretary of Transportation".

(6) Section 4(d)(1) is amended by striking out "(except a person enlisted under subsection (g) of this section)".

(7) Section 4(d)(3) is amended by striking out "Secretary of the Treasury" each time it appears and inserting in lieu thereof "Secretary of Transportation".

(8) The last proviso of section 5(a) is amended by striking out "and" at the end of paragraph (1): by striking out the period at the end of paragraph (2) and inserting in lieu thereof a semicolon and the word "and"; and by adding a new paragraph as follows:

"(3) no local board shall order for induction for training and service in the Armed Forces of the United States an alien unless such alien shall have resided in the United States for one year."

(9) Section 5 is further amended by adding at the end thereof the following new subsections:

"(d) Whenever the President has provided for the selection of persons for training and service in accordance with random selection under subsection (a) of this section, calls for induction may be placed under such rules and regulations as he may prescribe, notwithstanding the provisions of subsection (b) of this section.

"(e) Notwithstanding any other provision of this Act, not more than 130,000 persons may be inducted into the Armed Forces under this Act in the fiscal year ending June 30, 1972, and not more than 140,000 in the fiscal year ending June 30, 1973, unless a number greater than that authorized in this subsection for such fiscal year or years is authorized by a law enacted after the date of enactment of this subsection."

(10) The first sentence of section 6(a)(1) is amended by striking out the period and inserting in lieu thereof a colon and the following: "*Provided*, That any alien lawfully admitted for permanent residence as defined in paragraph (20) of section 101(a) of the Immigration and Nationality Act, as amended (66 Stat. 163, 8 U.S.C. 1101), and who by reason of occupational status is subject to adjustment to non-immigrant status under paragraph (15)(A), (15)(E), or (15)(G) of such section 101(a) but who executes a waiver in accordance with section 247(b) of that Act of all rights, privileges, exemptions, and immunities which would otherwise accrue to him as a result of that occupational status, shall be subject to registration under section 3 of this Act, but shall be deferred from induction for training and service for so long as such occupational status continues."

September 28, 1971

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(11) The second sentence of section 6(a) (1) is amended by striking out "eighteen" each time it appears and inserting in lieu thereof "twelve".

(12) Section 6(b) (3) is amended by striking out "section 4(i)" and inserting in lieu thereof "section 5(a)".

(13) Section 6(b) (4) is amended by striking out "or section 4(g)".

(14) Section 6(d) (1) is amended by striking out "Secretary of the Treasury" each time it appears and inserting in lieu thereof "Secretary of Transportation"; and by striking out "section 4(d) (3) of this Act" each time it appears and inserting in lieu thereof "section 651 of title 10, United States Code".

(15) Section 6(d) (5) is amended by striking out "Environmental Science Services Administration" each time it appears and inserting in lieu thereof "National Oceanic and Atmospheric Administration".

(16) Section 6(g) is amended to read as follows:

"(g) (1) Regular or duly ordained ministers of religion, as defined in this title, shall be exempt from training and service, but not from registration, under this title.

"(2) Students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be deferred from training and service, but not from registration, under this title. Persons who are or may be deferred under the provisions of this subsection shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. The foregoing sentence shall not be construed to prevent the exemption or continued deferment of such persons if otherwise exempted or deferrable under any other provision of this Act."

(17) Section 6(h) (1) is repealed.

(18) Section 6(h) (2) is amended by striking out the designation "(2)" and the word "graduate" from the first sentence.

(19) Section 6(i) (1) is amended to read as follows:

"(1) Any person who is satisfactorily pursuing a full-time course of instruction at a high school or similar institution of learning and is issued an order for induction shall, upon the facts being presented to the local board, have his induction postponed (A) until the time of his graduation therefrom, or (B) until he attains the twentieth anniversary of his birth, or (C) until he ceases satisfactorily to pursue such course of instruction, whichever is the earliest. Notwithstanding the preceding sentence, any person who attains the twentieth anniversary of his birth after beginning his last academic year of high school shall have his induction postponed until the end of that academic year if and so long as he continues to pursue satisfactorily a full-time course of instruction."

(20) Section 6(i) (2) is amended to read as follows:

"(2) Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title, shall, upon the appropriate facts being presented to the local board, have his induction postponed (A) until the end of the semester or term, or academic year in the case of his last academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier."

(21) Section 6 (j) is amended by (A) striking out in the third sentence "local board pursuant to Presidential regulations" and inserting in lieu thereof "Director"; and (B) adding at the end of such section

Active duty
requirement.
81 Stat. 101.
50 USC app.
456.
69 Stat. 224.
62 Stat. 609.
65 Stat. 83;
69 Stat. 604.

76 Stat. 167.

Divinity
students,
deferment.

Ante, p. 348.

81 Stat. 102.
Repeal.

High school
students,
deferment.
65 Stat. 85.

College
students,
deferment.

85 STAT. 350
85 STAT. 351

Conscientious
objectors.
81 Stat. 104.

the following "The Director shall be responsible for finding civilian work for persons exempted from training and service under this subsection and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety, or interest."

Induction ex-
emption.
78 Stat. 296.
50 USC app.
456.

(22) Section 6(o) is amended to read as follows:

"(o) Except during the period of a war or a national emergency declared by Congress, no person may be inducted for training and service under this title unless he volunteers for such induction—

"(1) if the father or a brother or a sister of such person was killed in action or died in line of duty while serving in the Armed Forces after December 31, 1959, or died subsequent to such date as a result of injuries received or disease incurred in line of duty during such service, or

"(2) during any period of time in which the father or a brother or a sister of such person is in a captured or missing status as a result of such service.

"Brother",
"sister."

As used in this subsection, the term 'brother' or 'sister' means a brother of the whole blood or a sister of the whole blood, as the case may be."

62 Stat. 618;
64 Stat. 1074.

(23) Section 9(j) is amended by striking out "or Treasury" and inserting in lieu thereof "or Transportation".

50 USC app. 459.
50 USC app. 460.

(24) Section 10(a) (3) is amended to read as follows:

"(3) The Director shall be appointed by the President, by and with the advice and consent of the Senate."

(25) Section 10(b) (2) is amended by changing the first semicolon to a colon and inserting immediately thereafter the following: "*Provided*, That no State director shall serve concurrently in an elected or appointed position of a State or local government without the approval of the Director:"

Civilian local
boards.
81 Stat. 104.

(26) Section 10(b) (3) is amended by striking out all down through the first period and the succeeding seven sentences, and inserting in lieu thereof the following:

"(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this title: *Provided*, That no person shall be disqualified from serving as a counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, territory, and possession of the United States, and in the District of Columbia. The local board and/or its staff shall perform their official duties only within the county or political subdivision corresponding thereto for which the local board is established, or in the case of an intercounty board, within the area for which such board is established, except that the staffs of local boards in more than one county of a State or comparable jurisdiction may be collocated or one staff may serve local boards in more than one county of a State or comparable jurisdiction when such action is approved by the Governor or comparable executive official or officials. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective Governors or comparable executive officials. In making such appointments after the date of the enactment of the Act enacting this sentence, the President is requested to appoint the membership of each local board so

Membership.

85 STAT. 351
85 STAT. 352

that to the maximum extent practicable it is proportionately representative of the race and national origin of those registrants within its jurisdiction, but no action by any local board shall be declared invalid on the ground that any board failed to conform to any particular quota as to race or national origin. No citizen shall be denied membership on any local board or appeal board on account of sex. After December 31, 1971, no person shall serve on any local board or appeal board who has attained the age of 65 or who has served on any local board or appeal board for a period of more than 20 years. Notwithstanding any other provision of this paragraph, an intercounty local board consisting of at least one member from each component county or corresponding subdivision may, with the approval of the Governor or comparable executive official or officials, be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved, that the establishment of such local board area will result in a more efficient and economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. A local board may include among its members any citizen otherwise qualified under Presidential regulations, provided he is at least eighteen years of age. No member of any local board shall be a member of the Armed Forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area."

(27) Section 10(e) is repealed.

(28) Section 10(f) is amended by striking out "\$50" and inserting in lieu thereof "\$500".

(29) Section 10 is further amended by adding at the end thereof a new subsection as follows:

"(h) If at any time calls under this section for the induction of persons for training and service in the Armed Forces are discontinued because the Armed Forces are placed on an all volunteer basis for meeting their active duty manpower needs, the Selective Service System, as it is constituted on the date of the enactment of this subsection, shall, nevertheless, be maintained as an active standby organization, with (1) a complete registration and classification structure capable of immediate operation in the event of a national emergency, and (2) personnel adequate to reinstitute immediately the full operation of the System, including military reservists who are trained to operate such System and who can be ordered to active duty for such purpose in the event of a national emergency."

(30) Section 11 is amended to read as follows:

"SEC. 11. Under such rules and regulations as may be prescribed by the President, funds available to carry out the provisions of this title shall also be available for the payment of actual and reasonable expenses of emergency medical care, including hospitalization, of registrants who suffer illness or injury, and the transportation and burial of the remains of registrants who suffer death, while acting under orders issued under the provisions of this title, but such burial expenses shall not exceed the maximum that the Administrator of Veterans' Affairs may pay under the provisions of section 902(a) of title 38, United States Code, in any one case."

(31) Section 12 is amended by adding at the end thereof a new subsection (d) as follows:

Repeal.

62 Stat. 618.

50 USC app. 460.

Selective Service System, maintenance.

65 Stat. 87.

Burial expenses.

62 Stat. 621.

50 USC app. 461.

80 Stat. 29.

Statute of limitations, extension.

81 Stat. 105.

85 STAT. 353

Ante, p. 348.

Effective date.
62 Stat. 623.
50 USC app. 463.

Publication in
Federal Register.

62 Stat. 624.
50 USC app.
465.
65 Stat. 78.
50 USC app.
454.

62 Stat. 624.
50 USC app. 466.
Effective date,
time extension..
81 Stat. 105.

64 Stat. 318.
50 USC 471.

"(d) No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur."

(32) Section 13(b) is amended by adding at the end thereof the following: "Notwithstanding the foregoing sentence, no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of this subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued."

(33) Section 15(d) is amended to read as follows:

"(d) Except as provided in section 4(c), nothing contained in this title shall be construed to repeal, amend, or suspend the laws now in force authorizing voluntary enlistment or reenlistment in the Armed Forces of the United States, including the reserve components thereof, except that no person shall be accepted for enlistment after he has been issued an order to report for induction unless authorized by the Director and the Secretary of Defense and except that, whenever the Congress or the President has declared that the national interest is imperiled, voluntary enlistment or reenlistment in such forces, and their reserve components, may be suspended by the President to such extent as he may deem necessary in the interest of national defense."

(34) Section 16(g)(3) is amended by inserting "bona fide" immediately before "vocation".

(35) Section 17(c) is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973". The amendment made by the preceding sentence shall take effect July 2, 1971.

(36) At the end of the Act add a new section as follows:

"PROCEDURAL RIGHTS

"SEC. 22. (a) It is hereby declared to be the purpose of this section to guarantee to each registrant asserting a claim before a local or appeal board, a fair hearing consistent with the informal and expeditious processing which is required by selective service cases.

"(b) Pursuant to such rules and regulations as the President may prescribe—

"(1) Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service System to testify and present evidence regarding his status.

"(2) Subject to reasonable limitations on the number of witnesses and the total time allotted to each registrant, each registrant shall have the right to present witnesses on his behalf before the local board.

"(3) A quorum of any local board or appeal board shall be present during the registrant's personal appearance.

"(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

(b) Notwithstanding the repeal of section 6(h) (1) of the Military Selective Service Act of 1967 made by subsection (a) (17) of this section, any person (1) who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of higher learning, (2) who met the academic requirements of a student deferment prescribed in such section 6(h) (1), and (3) who was satisfactorily pursuing such a full-time course prior to the date of enactment of this Act and during the 1970-1971 regular academic school year shall be deferred from induction for training and service in the Armed Forces under the same terms and conditions such person would have been deferred under the provisions of such section 6(h) (1) had such provision not been repealed. Savings provision.

(c) The Secretary of Defense and the Secretary of Health, Education, and Welfare shall conduct a joint study of practicable means of meeting the medical needs of the Armed Forces through means which would require less dependence on medical personnel of the Armed Forces. In carrying out such study special consideration shall be given to the feasibility of providing medical care for military personnel and their dependents under contracts with clinics, hospitals, and individual members of the medical profession at or near United States military installations within and outside the United States. The results of such study, together with such recommendations as the Secretary of Defense and the Secretary of Health, Education, and Welfare deem appropriate, shall be submitted to the President and the Congress not later than six months after the date of enactment of this subsection. Medical needs, study. Report to President and Congress.

(d) (1) Subject to the provisions of paragraph (2) of this subsection any surviving son or sons of a family who (A) were inducted into the Armed Forces under the Military Selective Service Act of 1967, (B) have not reenlisted or otherwise voluntarily extended their period of active duty in the Armed Forces, and (C) are serving on active duty with the Armed Forces on or after the date of enactment of this subsection, and such son or sons could not, if they were not in the Armed Forces, be involuntarily inducted into military service under the Military Selective Service Act as a result of the amendment made by paragraph (22) of subsection (a) of this section, such surviving son or sons shall, upon application, be promptly discharged from the Armed Forces. Surviving son, discharge. 65 Stat. 75; 81 Stat. 100. 50 USC app. 451.

(2) The provisions of paragraph (1) of this subsection shall not apply in the case of any member of the Armed Forces against whom court-martial charges are pending, or in the case of any member who has been tried and convicted by a court-martial for an offense and whose case is being reviewed or appealed, or in the case of any member who has been tried and convicted by a court-martial for an offense and who is serving a sentence (or otherwise satisfying punishment) imposed by such court-martial, until final action (including completion of any punishment imposed pursuant to such court-martial) has been completed with respect to such charges, review, or appeal, or until the sentence has been served (or until any other punishment imposed has been satisfied), as the case may be. The President shall have authority to implement the provisions of this subsection by regulations.

(3) Notwithstanding the amendment made by paragraph (22) of subsection (a) of this section, except during the period of a war or a national emergency declared by Congress, the sole surviving son of any family in which the father or one or more sons or daughters thereof were killed in action before January 1, 1960, or died in line of duty before January 1, 1960, while serving in the Armed Forces of the United States, or died subsequent to such date as a result of

85 STAT. 355

injuries received or disease incurred before such date during such service shall not be inducted under the Military Selective Service Act unless he volunteers for induction.

81 Stat. 105.

SEC. 102. Section 1 of the Act of August 3, 1950, chapter 537, as amended (10 U.S.C. 3201 note), is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973".

SEC. 103. Section 9 of the Act of June 27, 1957, Public Law 85-62, as amended (81 Stat. 105), is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973".

SEC. 104. Sections 302 and 303 of title 37, United States Code, are each amended by striking out "July 1, 1971" whenever that date appears and inserting in place thereof "July 1, 1973".

SEC. 105. Section 16 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2216) is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973".

Nondiscrimination.

SEC. 106. Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

"Facility or installation operated by the Department of Defense."

TITLE II—PAY INCREASE FOR UNIFORMED SERVICES; SPECIAL PAY

81 Stat. 649.

SEC. 201. Section 203(a) of title 37, United States Code, is amended to read as follows:

"(a) The rates of monthly basic pay for members of the uniformed services within each pay grade are set forth in the following tables:

"Commissioned Officers

Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
O-10 ¹	\$2,111.40	\$2,185.80	\$2,185.80	\$2,185.80	\$2,185.80
O-9 ¹	1,871.40	1,920.60	1,961.70	1,961.70	1,961.70
O-8 ¹	1,695.00	1,745.70	1,787.40	1,787.40	1,787.40
O-7 ¹	1,408.20	1,504.20	1,504.20	1,504.20	1,571.10
O-6 ¹	1,043.70	1,147.20	1,221.90	1,221.90	1,221.90
O-5 ¹	834.60	980.70	1,047.90	1,047.90	1,047.90
O-4 ¹	704.10	856.50	914.40	914.40	930.60
O-3 ¹	654.30	731.10	781.20	864.90	906.00
O-2 ¹	570.30	622.80	748.20	773.10	789.30
O-1 ¹	495.00	515.40	622.80	622.80	622.80

Years of service computed under section 205

Pay grade	Years of service computed under section 205				
	Over 8	Over 10	Over 12	Over 14	Over 16
O-10 ¹	\$2,269.50	\$2,269.50	\$2,443.50	\$2,443.50	\$2,618.40
O-9 ¹	2,011.20	2,011.20	2,094.60	2,094.60	2,269.50
O-8 ¹	1,920.60	1,920.60	2,011.20	2,011.20	2,094.60
O-7 ¹	1,571.10	1,662.60	1,662.60	1,745.70	1,920.60
O-6 ¹	1,221.90	1,221.90	1,221.90	1,263.30	1,463.10
O-5 ¹	1,047.90	1,080.30	1,137.90	1,213.80	1,304.70
O-4 ¹	972.30	1,038.30	1,097.10	1,147.20	1,197.00
O-3 ¹	938.70	989.10	1,038.30	1,063.80	1,063.80
O-2 ¹	789.30	789.30	789.30	789.30	789.30
O-1 ¹	622.80	622.80	622.80	622.80	622.80

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"COMMISSIONED OFFICERS—continued

Pay grade	Years of service computed under section 205				
	Over 18	Over 20	Over 22	Over 26	Over 30
O-10 ¹	\$2,618.40	\$2,793.30	\$2,793.30	\$2,967.60	\$2,967.60
O-9	2,269.50	2,443.50	2,443.50	2,618.40	2,618.40
O-8	2,185.80	2,269.50	2,361.00	2,361.00	2,361.00
O-7	2,052.60	2,052.60	2,052.60	2,052.60	2,052.60
O-6	1,537.80	1,571.10	1,662.60	1,803.30	1,803.30
O-5	1,379.70	1,421.10	1,471.20	1,471.20	1,471.20
O-4	1,230.30	1,230.30	1,230.30	1,230.30	1,230.30
O-3 ¹	1,063.80	1,063.80	1,063.80	1,063.80	1,063.80
O-2 ²	789.30	789.30	789.30	789.30	789.30
O-1 ²	622.80	622.80	622.80	622.80	622.80

¹ While serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, basic pay for this grade is \$3,000 regardless of cumulative years of service computed under section 205 of this title.

² Does not apply to commissioned officers who have been credited with over 4 years' active service as enlisted members

"COMMISSIONED OFFICERS WHO HAVE BEEN CREDITED WITH OVER 4 YEARS' ACTIVE SERVICE AS ENLISTED MEMBERS

Pay grade	Years of service computed under section 205				
	Over 4	Over 6	Over 8	Over 10	Over 14
O-3	\$864.90	\$906.00	\$938.70	\$989.10	\$1,038.30
O-2	773.10	789.30	814.20	856.50	889.80
O-1	622.80	665.10	690.00	714.60	739.80

Pay grade	Years of service computed under section 205				
	Over 16	Over 18	Over 20	Over 22	Over 26
O-3	\$1,080.30	\$1,080.30	\$1,080.30	\$1,080.30	\$1,080.30
O-2	914.40	914.40	914.40	914.40	914.40
O-1	773.10	773.10	773.10	773.10	773.10

"WARRANT OFFICERS

Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
W-4	\$666.30	\$714.60	\$714.60	\$731.10	\$764.40
W-3	605.70	657.00	657.00	665.10	673.20
W-2	530.40	573.60	573.60	590.40	622.80
W-1	441.90	507.00	507.00	549.00	573.60

Pay grade	Years of service computed under section 205				
	Over 8	Over 10	Over 12	Over 14	Over 16
W-4	\$798.00	\$831.00	\$889.80	\$930.60	\$963.90
W-3	722.40	764.40	789.30	814.20	838.80
W-2	657.00	681.90	706.50	731.10	756.60
W-1	598.50	622.80	648.30	673.20	698.10

Pay grade	Years of service computed under section 205				
	Over 18	Over 20	Over 22	Over 26	Over 30
W-4	\$989.10	\$1,022.10	\$1,056.00	\$1,137.90	\$1,137.90
W-3	864.90	897.90	930.60	963.90	963.90
W-2	781.20	806.10	838.80	838.80	838.80
W-1	722.40	748.20	748.20	748.20	748.20

UNLISTED MEMBERS

Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
E-9 ¹					
E-8					
E-7	\$443.40	\$478.50	\$496.20	\$513.60	\$531.30
E-6	382.80	417.90	435.00	453.00	470.40
E-5	336.30	366.00	383.70	400.50	426.60
E-4	323.40	341.40	361.20	389.40	405.00
E-3	311.10	328.20	341.10	354.60	354.60
E-2	299.10	299.10	299.10	299.10	299.10
E-1	268.50	268.50	268.50	268.50	268.50

Pay grade	Years of service computed under section 205				
	Over 8	Over 10	Over 12	Over 14	Over 16
E-9 ¹		\$756.90	\$774.30	\$792.00	\$809.70
E-8	\$635.10	652.80	670.20	687.90	705.30
E-7	548.10	565.50	583.50	609.60	626.70
E-6	487.50	505.20	531.30	548.10	565.50
E-5	444.00	461.70	478.50	487.50	487.50
E-4	405.00	405.00	405.00	405.00	405.00
E-3	354.60	354.60	354.60	354.60	354.60
E-2	299.10	299.10	299.10	299.10	299.10
E-1	268.50	268.50	268.50	268.50	268.50

Pay grade	Years of service computed under section 205				
	Over 18	Over 20	Over 22	Over 26	Over 30
E-9 ¹	\$827.70	\$843.90	\$888.60	\$975.00	\$975.00
E-8	722.10	740.10	783.60	870.90	870.90
E-7	644.10	652.80	696.60	783.60	783.60
E-6	574.50	574.50	574.50	574.50	574.50
E-5	487.50	487.50	487.50	487.50	487.50
E-4	405.00	405.00	405.00	405.00	415.00
E-3	354.60	354.60	354.60	354.60	354.60
E-2	299.10	299.10	299.10	299.10	299.10
E-1	268.50	268.50	268.50	268.50	268.50

¹ While serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy, Chief Master Sergeant of the Air Force, or Sergeant Major of the Marine Corps, basic pay for this grade is \$1,185 regardless of cumulative years of service computed under section 205 of this title.

76 Stat. 461.
37 USC 301.

SEC. 202. (a) Chapter 5 of title 37, United States Code, is amended by adding after section 302 a new section as follows:

“§ 302a. Special pay: optometrists

“(a) In addition to any other basic pay, special pay, incentive pay, or allowances to which he is entitled, each of the following officers is entitled to special pay at the rate of \$100 a month for each month of active duty:

“(1) a commissioned officer—

“(A) of the Regular Army or the Regular Navy who is designated as an optometry officer;

“(B) of the Regular Air Force who is designated as an optometry officer; or

“(C) who is an optometry officer of the Regular Corps of the Public Health Service;

who was on active duty on the effective date of this section; who retired before that date and was ordered to active duty after that date and before July 1, 1973; or who was designated as such an officer after the effective date of this section and before July 1, 1973;

“(2) a commissioned officer—

“(A) of a reserve component of the Army or Navy who is designated as an optometry officer;

"(B) of a reserve component of the Air Force who is designated as an optometry officer; or

"(C) who is an optometry officer of the Reserve Corps of the Public Health Service;

who was on active duty on the effective date of this section as a result of a call or order to active duty for a period of at least one year; or who, after that date and before July 1, 1973, is called or ordered to active duty for such a period; and

"(3) a general officer of the Army or the Air Force appointed, from any of the categories named in clause (1) or (2), in the Army, the Air Force, or the National Guard, as the case may be, who was on active duty on the effective date of this section; who was retired before that date and was ordered to active duty after that date and before July 1, 1973; or who, after the effective date of this section, was appointed from any of those categories.

"(b) The amount set forth in subsection (a) of this section may not be included in computing the amount of an increase in pay authorized by any other provision of this title or in computing retired pay or severance pay."

(b) The table of sections at the beginning of chapter 5 of such title is amended by inserting

"302a. Special pay: optometrists."

immediately below

"302. Special pay: physicians and dentists."

SEC. 203. (a) Chapter 5 of title 37, United States Code, is amended by adding after section 308 a new section as follows:

76 Stat. 461.
37 USC 301.

"§ 308a. Special pay: enlistment bonus

"(a) Notwithstanding section 514(a) of title 10 or any other provision of law, a person who enlists in any combat element of an armed force for a period of at least three years, or who extends his initial period of active duty in a combat element of an armed force to a total of at least three years, may, under regulations to be prescribed by the Secretary of Defense, be paid a bonus in an amount prescribed by the Secretary, but not more than \$3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the Secretary.

70A Stat. 19.

"(b) Under regulations approved by the Secretary of Defense, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forces made after June 30, 1973."

(b) The table of sections at the beginning of chapter 5 of such title is amended by inserting

"308a. Special pay: enlistment bonus."

immediately below

"308. Special pay: reenlistment bonus."

SEC. 204. Section 403(a) of title 37, United States Code, is amended to read as follows:

Quarters allowance.
80 Stat. 1122.

"(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

"Pay grade	Without dependents	With dependents
O-10	\$230.40	\$288.00
O-9	230.40	288.00
O-8	230.40	288.00
O-7	230.40	288.00
O-6	211.80	258.30
O-5	198.30	238.80
O-4	178.80	215.40
O-3	158.40	195.60
O-2	138.60	175.80
O-1	108.90	141.60
W-4	172.50	207.90
W-3	155.40	191.70
W-2	137.10	173.70
W-1	123.90	160.80
E-9	130.80	184.20
E-8	122.10	172.20
E-7	104.70	161.40
E-6	95.70	150.03
E-5	92.70	138.60
E-4 (over 4 years' service)	81.60	121.50
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than four years' service), E-3, E-2, or E-1 is considered at all times to be without dependents."

SEC. 205. (a) Chapter 7 of title 37, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 428. Allowance for recruiting expenses

"In addition to other pay or allowances authorized by law, and under uniform regulations prescribed by the Secretaries concerned, a member who is assigned to recruiting duties for his armed force may be reimbursed for actual and necessary expenses incurred in connection with those duties."

(b) The table of sections at the beginning of chapter 7 of such title is amended by adding at the end thereof the following new item:

"428. Allowance for recruiting expenses."

SEC. 206. Section 3 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2203) is amended to read as follows:

"SEC. 3. For the duration of this Act, section 403(a) of title 37, United States Code, is amended by striking out that part of the table which prescribes monthly basic allowances for quarters for enlisted members in pay grades E-1, E-2, E-3, and E-4 (four years' or less service) and inserting in lieu thereof the following:

E-4 (four years' or less service)	\$81.60	\$121.50
E-3	72.30	105.00
E-2	63.90	105.00
E-1	60.00	105.00"

SEC. 207. Section 4 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2204) is amended by inserting immediately before "Pro-vided further" the following: "; or (7) for the calendar months in which such member serves on active duty for training (including full-time duty performed by members of the Army or Air National Guard for which they receive pay from the United States in accordance with section 204 of title 37, United States Code) if that training is for a period of 30 days or more".

SEC. 208. Section 7 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2207) is amended by striking out "to enlisted members on active duty for training under section 262 of the Armed Forces Reserve Act of 1952, as amended (50 U.S.C. 1013), or any other enlistment program that requires an initial period of active duty for training,".

SEC. 209. The foregoing provisions of this title shall become effective

76 Stat. 469.
37 USC 401.

Quarters allow-
ance.
81 Stat. 654.
Ante, p. 358.

76 Stat. 496.

76 Stat. 457.

64 Stat. 796;

76 Stat. 153.

77 Stat. 134.

Effective dates.

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on October 1, 1971, except that section 203 shall become effective on such date as shall be prescribed by the Secretary of Defense, but not earlier than February 1, 1971, and section 206 shall become effective July 1, 1971.

Sec. 210. The enactment of this title shall not reduce the pay to which any member of the uniformed services was entitled on June 30, 1971.

Sec. 211. Not later than June 30, 1972, the Secretary of Defense shall report to the Chairmen of the Armed Services Committees of the Senate and of the House of Representatives on the effectiveness of the provisions of this title in increasing the number of volunteers enlisting for active duty in the Armed Forces of the United States.

Report to
congressional
committees.

TITLE III—ACTIVE DUTY STRENGTH LEVELS FOR FISCAL YEAR 1972

Sec. 301. For the fiscal year beginning July 1, 1971, and ending June 30, 1972, each of the following armed forces is authorized an average active duty personnel strength as follows:

- (1) the Army, 974,309;
- (2) the Navy, 613,619;
- (3) the Marine Corps, 209,846; and
- (4) the Air Force, 755,635;

except that such ceilings shall not include members of the Ready Reserve of any armed force ordered to active duty under the provisions of section 673 of title 10, United States Code, members of the Army National Guard, or members of the Air National Guard called into Federal service under section 3500 or 8500, as the case may be, of title 10, United States Code, or members of the militia of any State called into Federal service under chapter 15 of title 10, United States Code. Whenever one or more units of the Ready Reserve are ordered to active duty after the date of enactment of this section, the President shall, beginning with the second fiscal year quarter immediately following the quarter in which the first unit or units are ordered to active duty and on the first day of each succeeding six-month period thereafter, so long as any such unit is retained on active duty, submit a report to the Congress regarding the necessity for such unit or units being ordered to active duty. The President shall include in each such report a statement of the mission of each such unit ordered to active duty, an evaluation of such unit's performance of that mission, where each such unit is being deployed at the time of the report, and such other information regarding each such unit as the President deems appropriate.

70A Stat. 28;
72 Stat. 1441.
70A Stat. 199,
525.
70A Stat. 15.
10 USC 331.
Report to
Congress.

TITLE IV—TERMINATION OF HOSTILITIES IN INDOCHINA

Sec. 401. It is hereby declared to be the sense of Congress that the United States terminate at the earliest practicable date all military operations of the United States in Indochina, and provide for the prompt and orderly withdrawal of all United States military forces at a date certain subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government, and an accounting for all Americans missing in action who have been held by or known to such Government or such forces. The Congress hereby urges and requests the President to implement the above expressed policy by initiating immediately the following actions:

(1) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(2) Negotiate with the Government of North Vietnam for the establishing of a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release at a date certain of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina subject to a corresponding series of phased releases of American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established pursuant to paragraph (2) hereof.

TITLE V—IDENTIFICATION AND TREATMENT OF DRUG AND ALCOHOL DEPENDENT PERSONS IN THE ARMED FORCES

SEC. 501. (a) The Secretary of Defense shall prescribe and implement procedures, utilizing all practical available methods, and provide necessary facilities to (1) identify, treat, and rehabilitate members of the Armed Forces who are drug or alcohol dependent persons, and (2) identify those individuals examined at Armed Forces examining and entrance stations who are drug or alcohol dependent persons. Those individuals found to be drug or alcohol dependent persons under clause (2) of the preceding sentence shall be refused entrance into the Armed Forces and referred to civilian treatment facilities.

(b) The Secretary of Defense shall report to Congress within 60 days after the date of the enactment of this Act with respect to (1) the plans and programs which have been initiated to carry out the purposes of subsection (a) of this section, and (2) such recommendations for additional legislative action as he deems necessary to combat effectively drug and alcohol dependence in the Armed Forces and to treat and rehabilitate effectively any member found to be a drug or alcohol dependent person.

TITLE VI—APPOINTMENT OF CERTAIN REGULAR, TEMPORARY, AND RESERVE OFFICERS TO BE MADE SUBJECT TO THE ADVICE AND CONSENT OF THE SENATE

Reserve officers. SEC. 601. Section 593(a) of title 10, United States Code, is amended
70A Stat. 25. to read as follows:

“(a) Appointments of Reserves in commissioned grades below lieutenant colonel and commander, except commissioned warrant officer, shall be made by the President alone. Appointments of Reserves in commissioned grades above major and lieutenant commander shall be made by the President, by and with the advice and consent of the Senate, except as provided in section 3352 or 8352 of this title.”

Army. SEC. 602. Section 3447(b) of title 10, United States Code, is amended
70A Stat. 196. to read as follows:

“(b) Temporary appointments of commissioned officers in the Regular Army shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and

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85 STAT. 362

consent of the Senate, in grades of lieutenant colonel and above. Temporary appointments of commissioned officers in the reserve components of the Army shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades above major."

SEC. 603. (a) The second sentence of section 5597(e) of title 10, United States Code, is amended to read as follows: "Such appointments shall be made by the President alone, except that appointments under subsections (f) and (g) in grades above lieutenant commander in the Navy shall be made by the President, by and with the advice and consent of the Senate."

Navy; Marine Corps.
70A Stat. 330.

(b) The second sentence of section 5787(e) of such title is amended to read as follows: "Each such appointment to a grade above lieutenant commander in the Navy or to a grade above major in the Marine Corps shall be made by the President, by and with the advice and consent of the Senate."

(c) The first sentence of section 5791(b) of such title is amended to read as follows: "Permanent and temporary appointments under this chapter in a grade above lieutenant commander in the Naval Reserve and in a grade above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate."

(d) The first sentence of section 5912 of such title is amended to read as follows: "Permanent and temporary appointments under this chapter in grades above lieutenant commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate."

72 Stat. 1507.

SEC. 604. Section 8447(b) of title 10, United States Code, is amended to read as follows:

Air Force.
70A Stat. 523.

"(b) Temporary appointments of commissioned officers in the Regular Air Force shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades of lieutenant colonel and above. Temporary appointments of commissioned officers in the reserve components of the Air Force shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades above major."

SEC. 605. Section 275(f) of title 14, United States Code, is amended by inserting the following sentence after the second sentence: "An appointment under this section to a grade above lieutenant commander of an officer in the Coast Guard Reserve shall be made by the President, by and with the advice and consent of the Senate."

Coast Guard.
77 Stat. 182.

TITLE VII—MISCELLANEOUS PROVISIONS

SEC. 701. Section 412(d)(2) of Public Law 86-149, as amended, is amended by (1) striking out "the President" and substituting in lieu thereof "the Secretary of Defense", (2) striking out "January 31" and substituting in lieu thereof "March 1", and (3) adding at the end

Report to Congress, extension.
84 Stat. 913.
10 USC 133 note.

thereof the following: "Such justification and explanation shall specify in detail for all forces, including each land force division, carrier and other major combatant vessel, air wing, and other comparable unit: (A) the unit mission and capability, (B) the strategy which the unit supports, and (C) the area of deployment and illustrative areas of potential deployment, including a description of any United States commitment to defend such areas. Such justification and explanation shall also include a detailed discussion of the manpower required for support and overhead functions within the Armed Services."

Approved September 28, 1971.

LEGISLATIVE HISTORY:

HOUSE REPORTS No. 92-82 (Comm. on Armed Services) and
No. 92-433 (Comm. of Conference).

SENATE REPORT No. 92-93 (Comm. on Armed Services).

CONGRESSIONAL RECORD, Vol. 117 (1971):

Mar. 30, 31, Apr. 1, June 28, Aug. 4, considered and
passed House.

May 6, 10-14, 17-20, 24-26, June 1-4, 7-11, 14-18,
21-24, Aug. 5, Sept. 13-17, 20, 21, considered
and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 7, No. 40:
Sept. 28, Presidential statement.

92D CONGRESS	}	HOUSE OF REPRESENTATIVES	}	REPORT
1st Session				No. 92-433

EXTENSION AND REVISION OF THE DRAFT ACT AND RELATED LAWS

JULY 30, 1971.—Ordered to be printed

Mr. HÉBERT, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 6531]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6531) to amend the Military Selective Service Act of 1967; to increase military pay; to authorize military active duty strengths for fiscal year 1972; and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

TITLE I—AMENDMENTS TO THE MILITARY SELECTIVE SERVICE ACT OF 1967; RELATED PROVISIONS

SEC. 101. (a) *The Military Selective Service Act of 1967, as amended, is amended as follows:*

(1) *Section 1(a) is amended to read as follows:*

“(a) *This Act may be cited as the ‘Military Selective Service Act’.*”

(2) *Section 3 is amended to read as follows:*

“SEC. 3. *Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully*

admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States."

(3) The first two paragraphs of section 4(a) are amended to read as follows:

"Except as otherwise provided in this title, every person required to register pursuant to section 3 of this title who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6(h) of this title, shall be liable for training and service in the Armed Forces of the United States: Provided, That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: Provided further, That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

"At such time as the period of active service in the Armed Forces required under this title of persons who have not attained the nineteenth anniversary of the day of their birth has been reduced or eliminated pursuant to the provisions of section 4(k) of this title, and except as otherwise provided in this title, every person who is required to register under this title and who has not attained the nineteenth anniversary of the day of his birth on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title, shall be liable for training in the National Security Training Corps: Provided, That persons deferred under the provisions of section 6 of this title shall not be relieved from liability for induction into the National Security Training Corps solely by reason of having exceeded the age of nineteen years during the period of such deferment. The President is authorized, from time to time, whether or not a state of war exists, to select and induct for training in the National Security Training Corps as hereinafter provided such number of persons as may be required to further the purposes of this title."

(4) The fourth paragraph of section 4(a) is amended by striking out "Secretary of the Treasury" and inserting in lieu thereof "Secretary of Transportation".

(5) Section 4(b) is amended by striking out "Secretary of the Treasury" each time it appears and inserting in lieu thereof "Secretary of Transportation".

(6) Section 4(d)(1) is amended by striking out "(except a person enlisted under subsection (g) of this section)".

(7) Section 4(d)(3) is amended by striking out "Secretary of the Treasury" each time it appears and inserting in lieu thereof "Secretary of Transportation".

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(8) *The last proviso of section 5(a) is amended by striking out "and" at the end of paragraph (1); by striking out the period at the end of paragraph (2) and inserting in lieu thereof a semicolon and the word "and"; and by adding a new paragraph as follows:*

"(3) no local board shall order for induction for training and service in the Armed Forces of the United States an alien unless such alien shall have resided in the United States for one year."

(9) *Section 5 is further amended by adding at the end thereof the following new subsections:*

"(d) Whenever the President has provided for the selection of persons for training and service in accordance with random selection under subsection (a) of this section, calls for induction may be placed under such rules and regulations as he may prescribe, notwithstanding the provisions of subsection (b) of this section.

"(e) Notwithstanding any other provision of this Act, not more than 130,000 persons may be inducted into the Armed Forces under this Act in the fiscal year ending June 30, 1972, and not more than 140,000 in the fiscal year ending June 30, 1973, unless a number greater than that authorized in this subsection for such fiscal year or years is authorized by a law enacted after the date of enactment of this subsection."

(10) *The first sentence of section 6(a)(1) is amended by striking out the period and inserting in lieu thereof a colon and the following: "Provided, That any alien lawfully admitted for permanent residence as defined in paragraph (20) of section 101(a) of the Immigration and Nationality Act, as amended (66 Stat. 163, 8 U.S.C. 1101), and who by reason of occupational status is subject to adjustment to nonimmigrant status under paragraph (15)(A), (15)(E), or (15)(G) of such section 101(a) but who executes a waiver in accordance with section 247(b) of that Act of all rights, privileges, exemptions, and immunities which would otherwise accrue to him as a result of that occupational status, shall be subject to registration under section 3 of this Act, but shall be deferred from induction for training and service for so long as such occupational status continues."*

(11) *The second sentence of section 6(a)(1) is amended by striking out "eighteen" each time it appears and inserting in lieu thereof "twelve".*

(12) *Section 6(b)(3) is amended by striking out "section 4(i)" and inserting in lieu thereof "section 5(a)".*

(13) *Section 6(b)(4) is amended by striking out "or section 4(g)".*

(14) *Section 6(d)(1) is amended by striking out "Secretary of the Treasury" each time it appears and inserting in lieu thereof "Secretary of Transportation"; and by striking out "section 4(d)(3) of this Act" each time it appears and inserting in lieu thereof "section 651 of title 10, United States Code".*

(15) *Section 6(d)(5) is amended by striking out "Environmental Science Services Administration" each time it appears and inserting in lieu thereof "National Oceanic and Atmospheric Administration".*

(16) *Section 6(g) is amended to read as follows:*

"(g)(1) Regular or duly ordained ministers of religion, as defined in this title, shall be exempt from training and service, but not from registration, under this title.

"(2) Students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or

divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be deferred from training and service, but not from registration, under this title. Persons who are or may be deferred under the provisions of this subsection shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. The foregoing sentence shall not be construed to prevent the exemption or continued deferment of such persons if otherwise exempted or deferrable under any other provision of this Act."

(17) Section 6(h)(1) is repealed.

(18) Section 6(h)(2) is amended by striking out the designation "(2)" and the word "graduate" from the first sentence.

(19) Section 6(i)(1) is amended to read as follows:

"(1) Any person who is satisfactorily pursuing a full-time course of instruction at a high school or similar institution of learning and is issued an order for induction shall, upon the facts being presented to the local board, have his induction postponed (A) until the time of his graduation therefrom, or (B) until he attains the twentieth anniversary of his birth, or (C) until he ceases satisfactorily to pursue such course of instruction, whichever is the earliest. Notwithstanding the preceding sentence, any person who attains the twentieth anniversary of his birth after beginning his last academic year of high school shall have his induction postponed until the end of that academic year if and so long as he continues to pursue satisfactorily a full-time course of instruction."

(20) Section 6(i)(2) is amended to read as follows:

"(2) Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title, shall, upon the appropriate facts being presented to the local board, have his induction postponed (A) until the end of the semester or term, or academic year in the case of his last academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier."

(21) Section 6(j) is amended by (A) striking out in the third sentence "local board pursuant to Presidential regulations" and inserting in lieu thereof "Director"; and (B) adding at the end of such section the following "The Director shall be responsible for finding civilian work for persons exempted from training and service under this subsection and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety, or interest."

(22) Section 6(o) is amended to read as follows:

"(o) Except during the period of a war or a national emergency declared by Congress, no person may be inducted for training and service under this title unless he volunteers for such induction—

"(1) if the father or a brother or a sister of such person was killed in action or died in line of duty while serving in the Armed Forces after December 31, 1959, or died subsequent to such date as a result of injuries received or disease incurred in line of duty during such service, or

"(2) during any period of time in which the father or a brother or a sister of such person is in a captured or missing status as a result of such service.

As used in this subsection, the term 'brother' or 'sister' means a brother of the whole blood or a sister of the whole blood, as the case may be."

(23) Section 9(j) is amended by striking out "or Treasury" and inserting in lieu thereof "or Transportation".

(24) Section 10(a)(3) is amended to read as follows:

"(3) The Director shall be appointed by the President, by and with the advice and consent of the Senate."

(25) Section 10(b)(2) is amended by changing the first semicolon to a colon and inserting immediately thereafter the following: "Provided, That no State director shall serve concurrently in an elected or appointed position of a State or local government without the approval of the Director;"

(26) Section 10(b)(3) is amended by striking out all down through the first period and the succeeding seven sentences, and inserting in lieu thereof the following:

"(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this title: Provided, That no person shall be disqualified from serving as a counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, territory, and possession of the United States, and in the District of Columbia. The local board and/or its staff shall perform their official duties only within the county or political subdivision corresponding thereto for which the local board is established, or in the case of an inter-county board, within the area for which such board is established, except that the staffs of local boards in more than one county of a State or comparable jurisdiction may be collocated or one staff may serve local boards in more than one county of a State or comparable jurisdiction when such action is approved by the Governor or comparable executive official or officials. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective Governors or comparable executive officials. In making such appointments after the date of the enactment of the Act enacting this sentence, the President is requested to appoint the membership of each local board so that to the maximum extent practicable it is proportionately representative of the race and national origin of those registrants within its jurisdiction, but no action by any local board shall be declared invalid on the ground that any board failed to conform to any particular quota as to race or national origin. No citizen shall be denied membership on any local board or appeal board on account of sex. After December 31, 1971, no person shall serve on any local board or appeal board who has attained the age of 65 or who has served on any local board or appeal board for a period of more than 20 years. Notwithstanding any other provision of this paragraph, an intercounty local board consisting of at least one member from each component county or corresponding subdivision may, with the approval of the Governor or comparable executive official or officials, be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved, that the establishment of such local board area will result in a more efficient and

economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. A local board may include among its members any citizen otherwise qualified under Presidential regulations, provided he is at least eighteen years of age. No member of any local board shall be a member of the Armed Forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area."

(27) Section 10(e) is repealed.

(28) Section 10(f) is amended by striking out "\$50" and inserting in lieu thereof "\$500".

(29) Section 10 is further amended by adding at the end thereof a new subsection as follows:

"(h) If at any time calls under this section for the induction of persons for training and service in the Armed Forces are discontinued because the Armed Forces are placed on an all volunteer basis for meeting their active duty manpower needs, the Selective Service System, as it is constituted on the date of the enactment of this subsection, shall, nevertheless, be maintained as an active standby organization, with (1) a complete registration and classification structure capable of immediate operation in the event of a national emergency, and (2) personnel adequate to reinstitute immediately the full operation of the System, including military reservists who are trained to operate such System and who can be ordered to active duty for such purpose in the event of a national emergency."

(30) Section 11 is amended to read as follows:

"SEC. 11. Under such rules and regulations as may be prescribed by the President, funds available to carry out the provisions of this title shall also be available for the payment of actual and reasonable expenses of emergency medical care, including hospitalization, of registrants who suffer illness or injury, and the transportation and burial of the remains of registrants who suffer death, while acting under orders issued under the provisions of this title, but such burial expenses shall not exceed the maximum that the Administrator of Veterans' Affairs may pay under the provisions of section 902(a) of title 38, United States Code, in any one case."

(31) Section 12 is amended by adding at the end thereof a new subsection (d) as follows:

"(d) No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur."

(32) Section 13(b) is amended by adding at the end thereof the following: "Notwithstanding the foregoing sentence, no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of this subsection may be waived by the President in the case of

any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued."

(33) Section 15(d) is amended to read as follows:

"(d) Except as provided in section 4(c), nothing contained in this title shall be construed to repeal, amend, or suspend the laws now in force authorizing voluntary enlistment or reenlistment in the Armed Forces of the United States, including the reserve components thereof, except that no person shall be accepted for enlistment after he has been issued an order to report for induction unless authorized by the Director and the Secretary of Defense and except that, whenever the Congress or the President has declared that the national interest is imperiled, voluntary enlistment or reenlistment in such forces, and their reserve components, may be suspended by the President to such extent as he may deem necessary in the interest of national defense."

(34) Section 16(g)(3) is amended by inserting "bona fide" immediately before "vocation".

(35) Section 17(c) is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973". The amendment made by the preceding sentence shall take effect July 2, 1971.

(36) At the end of the Act add a new section as follows:

"PROCEDURAL RIGHTS

"SEC. 22. (a) It is hereby declared to be the purpose of this section to guarantee to each registrant asserting a claim before a local or appeal board, a fair hearing consistent with the informal and expeditious processing which is required by selective service cases.

"(b) Pursuant to such rules and regulations as the President may prescribe—

"(1) Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service System to testify and present evidence regarding his status.

"(2) Subject to reasonable limitations on the number of witnesses and the total time allotted to each registrant, each registrant shall have the right to present witnesses on his behalf before the local board.

"(3) A quorum of any local board or appeal board shall be present during the registrant's personal appearance.

"(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

(b) Notwithstanding the repeal of section 6(h)(1) of the Military Selective Service Act of 1967 made by subsection (a)(17) of this section, any person (1) who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of higher learning, (2) who met the academic requirements of a student deferment prescribed in such section 6(h)(1), and (3) who was satisfactorily pursuing such a full-time course prior to the date of enactment of this Act and during the 1970-1971 regular academic school year shall be deferred from induction for training and service in the Armed Forces under the same terms and conditions such person would have been deferred under the provisions of such section 6(h)(1) had such provision not been repealed.

(c) The Secretary of Defense and the Secretary of Health, Education, and Welfare shall conduct a joint study of practicable means of meeting the medical needs of the Armed Forces through means which would require less dependence on medical personnel of the Armed Forces. In carrying

out such study special consideration shall be given to the feasibility of providing medical care for military personnel and their dependents under contracts with clinics, hospitals, and individual members of the medical profession at or near United States military installations within and outside the United States. The results of such study, together with such recommendations as the Secretary of Defense and the Secretary of Health, Education, and Welfare deem appropriate, shall be submitted to the President and the Congress not later than six months after the date of enactment of this subsection.

(d)(1) Subject to the provisions of paragraph (2) of this subsection any surviving son or sons of a family who (A) were inducted into the Armed Forces under the Military Selective Service Act of 1967, (B) have not reenlisted or otherwise voluntarily extended their period of active duty in the Armed Forces, and (C) are serving on active duty with the Armed Forces on or after the date of enactment of this subsection, and such son or sons could not, if they were not in the Armed Forces, be involuntarily inducted into military service under the Military Selective Service Act as a result of the amendment made by paragraph (22) of subsection (a) of this section, such surviving son or sons shall, upon application, be promptly discharged from the Armed Forces.

(2) The provisions of paragraph (1) of this subsection shall not apply in the case of any member of the Armed Forces against whom court-martial charges are pending, or in the case of any member who has been tried and convicted by a court-martial for an offense and whose case is being reviewed or appealed, or in the case of any member who has been tried and convicted by a court-martial for an offense and who is serving a sentence (or otherwise satisfying punishment) imposed by such court-martial, until final action (including completion of any punishment imposed pursuant to such court-martial) has been completed with respect to such charges, review, or appeal, or until the sentence has been served (or until any other punishment imposed has been satisfied), as the case may be. The President shall have authority to implement the provisions of this subsection by regulations.

(3) Notwithstanding the amendment made by paragraph (22) of subsection (a) of this section, except during the period of a war or a national emergency declared by Congress, the sole surviving son of any family in which the father or one or more sons or daughters thereof were killed in action before January 1, 1960, or died in line of duty before January 1, 1960, while serving in the Armed Forces of the United States or died subsequent to such date as a result of injuries received or disease incurred before such date during such service shall not be inducted under the Military Selective Service Act unless he volunteers for induction.

SEC. 102. Section 1 of the Act of August 3, 1950, chapter 537, as amended (10 U.S.C. 3201 note), is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973".

SEC. 103. Section 9 of the Act of June 27, 1957, Public Law 85-62, as amended (81 Stat. 105), is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973".

SEC. 104. Sections 302 and 303 of title 37, United States Code, are each amended by striking out "July 1, 1971" whenever that date appears and inserting in place thereof "July 1, 1973".

SEC. 105. Section 16 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2216) is amended by striking out "July 1, 1971" and inserting in place thereof "July 1, 1973".

SEC. 106. Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

TITLE II—PAY INCREASE FOR UNIFORMED SERVICES; SPECIAL PAY

SEC. 201. Section 203(a) of title 37, United States Code, is amended to read as follows:

"(a) The rates of monthly basic pay for members of the uniformed services within each pay grade are set forth in the following tables:

"Commissioned Officers

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
O-10 ¹	\$2,111.40	\$2,185.80	\$2,185.80	\$2,185.80	\$2,185.80
O-9	1,871.40	1,920.60	1,961.70	1,961.70	1,961.70
O-8	1,695.00	1,745.70	1,787.40	1,787.40	1,787.40
O-7	1,408.20	1,504.20	1,504.20	1,504.20	1,571.10
O-6	1,045.70	1,147.20	1,221.90	1,221.90	1,221.90
O-5	854.60	980.70	1,047.90	1,047.90	1,047.90
O-4	704.10	855.60	914.40	914.40	930.60
O-3 ²	664.30	731.10	781.20	854.90	906.00
O-2 ²	570.30	622.80	743.20	773.10	789.30
O-1 ²	496.00	516.40	622.80	622.80	622.80

"Pay grade	Years of service computed under section 205				
	Over 8	Over 10	Over 12	Over 14	Over 16
O-10 ¹	\$2,269.50	\$2,269.50	\$2,443.50	\$2,443.50	\$2,618.40
O-9	2,011.20	2,011.20	2,094.60	2,094.60	2,269.50
O-8	1,920.60	1,920.60	2,011.20	2,011.20	2,094.60
O-7	1,571.10	1,662.60	1,662.60	1,745.70	1,920.60
O-6	1,221.90	1,221.90	1,221.90	1,263.30	1,463.10
O-5	1,047.90	1,080.30	1,137.90	1,213.80	1,304.70
O-4	972.50	1,038.50	1,097.10	1,147.20	1,197.00
O-3 ²	938.70	989.10	1,038.30	1,063.80	1,093.80
O-2 ²	789.30	789.30	789.30	789.30	789.30
O-1 ²	622.80	622.80	622.80	622.80	622.80

"Pay grade	Years of service computed under section 205				
	Over 18	Over 20	Over 22	Over 26	Over 30
O-10 ¹	\$2,618.40	\$2,793.30	\$2,793.30	\$2,967.60	\$2,967.60
O-9	2,269.50	2,443.50	2,443.50	2,618.40	2,618.40
O-8	2,185.80	2,269.50	2,361.00	2,361.00	2,361.00
O-7	2,052.60	2,052.60	2,052.60	2,052.60	2,052.60
O-6	1,537.80	1,571.10	1,662.60	1,803.30	1,803.30
O-5	1,379.70	1,421.10	1,471.20	1,471.20	1,471.20
O-4	1,230.30	1,230.30	1,230.30	1,230.30	1,230.30
O-3 ²	1,063.80	1,063.80	1,063.80	1,063.80	1,063.80
O-2 ²	789.30	789.30	789.30	789.30	789.30
O-1 ²	622.80	622.80	622.80	622.80	622.80

¹¹ While serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, basic pay for this grade is \$3,000 regardless of cumulative years of service computed under section 205 of this title.

¹² Does not apply to commissioned officers who have been credited with over 4 years' active service as enlisted members.

"Commissioned Officers Who Have Been Credited With Over 4 Years' Active Service as Enlisted Members"

"Pay grade	Years of service computed under section 205					
	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14
O-3.....	\$864.90	\$906.00	\$938.70	\$989.10	\$1,038.30	\$1,080.30
O-2.....	773.10	789.30	814.20	866.50	889.80	914.40
O-1.....	622.80	666.10	690.00	714.60	739.80	773.10

"Pay grade	Years of service computed under section 205					
	Over 16	Over 18	Over 20	Over 22	Over 26	Over 30
O-3.....	\$1,080.30	\$1,080.30	\$1,080.30	\$1,080.30	\$1,080.30	\$1,080.30
O-2.....	914.40	914.40	914.40	914.40	914.40	914.40
O-1.....	773.10	773.10	773.10	773.10	773.10	773.10

"Warrant Officers"

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
W-4.....	\$666.30	\$714.60	\$714.60	\$731.10	\$764.40
W-3.....	606.70	657.00	657.00	665.10	673.20
W-2.....	590.40	673.60	673.60	590.40	622.80
W-1.....	441.80	507.00	507.00	549.00	673.60

"Pay grade	Years of service computed under section 205				
	Over 8	Over 10	Over 12	Over 14	Over 16
W-4.....	\$798.00	\$831.00	\$889.80	\$930.60	\$963.90
W-3.....	722.40	764.40	789.30	814.20	838.80
W-2.....	657.00	681.90	706.50	731.10	756.60
W-1.....	598.60	622.80	648.30	673.20	698.10

"Pay grade	Years of service computed under section 205				
	Over 18	Over 20	Over 22	Over 26	Over 30
W-4.....	\$989.10	\$1,022.10	\$1,056.00	\$1,137.90	\$1,157.90
W-3.....	864.90	897.90	930.60	963.90	963.90
W-2.....	781.20	806.10	838.80	838.80	838.80
W-1.....	722.40	748.20	748.20	748.20	748.20

"Enlisted Members"

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
E-9 ¹					
E-8.....					
E-7.....	\$443.40	\$478.50	\$496.20	\$513.60	\$531.90
E-6.....	382.80	417.90	436.00	453.00	470.40
E-5.....	336.90	366.00	383.70	400.60	426.60
E-4.....	323.40	341.00	361.20	389.40	406.00
E-3.....	311.10	328.20	341.10	364.60	354.60
E-2.....	299.10	299.10	299.10	299.10	299.10
E-1.....	268.60	268.60	268.60	268.60	268.60

"Enlisted Members—Continued

<i>"Pay grade</i>	<i>Years of service computed under section 205</i>				
	<i>Over 8</i>	<i>Over 10</i>	<i>Over 12</i>	<i>Over 14</i>	<i>Over 16</i>
<i>E-9</i> ¹		\$756.90	\$774.30	\$792.00	\$809.70
<i>E-8</i>	\$635.10	652.80	670.20	687.90	705.30
<i>E-7</i>	548.10	565.50	583.60	609.60	626.70
<i>E-6</i>	487.50	505.20	531.90	548.10	565.50
<i>E-5</i>	444.00	461.70	478.50	487.50	487.50
<i>E-4</i>	405.00	405.00	405.00	405.00	405.00
<i>E-3</i>	354.60	354.60	354.60	354.60	354.60
<i>E-2</i>	299.10	299.10	299.10	299.10	299.10
<i>E-1</i>	268.50	268.50	268.50	268.50	268.50

<i>"Pay grade</i>	<i>Years of service computed under section 205</i>				
	<i>Over 18</i>	<i>Over 20</i>	<i>Over 22</i>	<i>Over 26</i>	<i>Over 30</i>
<i>E-9</i> ¹	\$827.70	\$845.90	\$888.60	\$975.00	\$975.00
<i>E-8</i>	722.10	740.10	783.60	870.90	870.90
<i>E-7</i>	644.10	652.80	696.60	783.60	783.60
<i>E-6</i>	574.50	574.50	574.50	574.50	574.50
<i>E-5</i>	487.50	487.50	487.50	487.50	487.50
<i>E-4</i>	405.00	405.00	405.00	405.00	405.00
<i>E-3</i>	354.60	354.60	354.60	354.60	354.60
<i>E-2</i>	299.10	299.10	299.10	299.10	299.10
<i>E-1</i>	268.50	268.50	268.50	268.50	268.50

¹ While serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy, Chief Master Sergeant of the Air Force, or Sergeant Major of the Marine Corps, basic pay for this grade is \$1,185 regardless of cumulative years of service computed under section 205 of this title."

SEC. 202. (a) Chapter 5 of title 37, United States Code, is amended by adding after section 302 a new section as follows:

"§ 302a. Special pay: optometrists

"(a) In addition to any other basic pay, special pay, incentive pay, or allowances to which he is entitled, each of the following officers is entitled to special pay at the rate of \$100 a month for each month of active duty:

"(1) a commissioned officer—

"(A) of the Regular Army or the Regular Navy who is designated as an optometry officer;

"(B) of the Regular Air Force who is designated as an optometry officer; or

"(C) who is an optometry officer of the Regular Corps of the Public Health Service;

who was on active duty on the effective date of this section; who retired before that date and was ordered to active duty after that date and before July 1, 1973; or who was designated as such an officer after the effective date of this section and before July 1, 1973;

"(2) a commissioned officer—

"(A) of a reserve component of the Army or Navy who is designated as an optometry officer;

"(B) of a reserve component of the Air Force who is designated as an optometry officer; or

"(C) who is an optometry officer of the Reserve Corps of the Public Health Service;

who was on active duty on the effective date of this section as a result of a call or order to active duty for a period of at least one year; or who, after that date and before July 1, 1973, is called or ordered to active duty for such a period; and

“(3) a general officer of the Army or the Air Force appointed, from any of the categories named in clause (1) or (2), in the Army, the Air Force, or the National Guard, as the case may be, who was on active duty on the effective date of this section; who was retired before that date and was ordered to active duty after that date and before July 1, 1973; or who, after the effective date of this section, was appointed from any of those categories.

“(b) The amount set forth in subsection (a) of this section may not be included in computing the amount of an increase in pay authorized by any other provision of this title or in computing retired pay or severance pay.”

(b) The table of sections at the beginning of chapter 5 of such title is amended by inserting

“302a. Special pay: optometrists.”

immediately below

“302. Special pay: physicians and dentists.”

SEC. 203. (a) Chapter 5 of title 37, United States Code, is amended by adding after section 308 a new section as follows:

“§ 308a. Special pay: enlistment bonus

“(a) Notwithstanding section 514(a) of title 10 or any other provision of law, a person who enlists in any combat element of an armed force for a period of at least three years, or who extends his initial period of active duty in a combat element of an armed force to a total of at least three years, may, under regulations to be prescribed by the Secretary of Defense, be paid a bonus in an amount prescribed by the Secretary, but not more than \$3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the Secretary.

“(b) Under regulations approved by the Secretary of Defense, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

“(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forces made after June 30, 1973.”

(b) The table of sections at the beginning of chapter 5 of such title is amended by inserting

“308a. Special pay: enlistment bonus.”

immediately below

“308. Special pay: reenlistment bonus.”

SEC. 204. Section 403(a) of title 37, United States Code, is amended to read as follows:

“(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

"Pay grade	Without dependents	With dependents
O-10	\$290.40	\$288.00
O-9	290.40	288.00
O-8	290.40	288.00
O-7	290.40	288.00
O-6	211.80	268.50
O-5	198.90	238.80
O-4	178.80	215.40
O-3	168.40	195.60
O-2	138.60	175.80
O-1	108.90	141.60
W-4	172.50	207.90
W-3	165.40	191.70
W-2	157.10	175.70
W-1	123.90	160.80
E-9	130.80	184.20
E-8	122.10	172.20
E-7	104.70	161.40
E-6	95.70	160.00
E-5	92.70	138.60
E-4 (over 4 years' service)	81.60	121.50
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than four years' service), E-3, E-2, or E-1 is considered at all times to be without dependents."

SEC. 205. (a) Chapter 7 of title 37, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 428. Allowance for recruiting expenses

"In addition to other pay or allowances authorized by law, and under uniform regulations prescribed by the Secretaries concerned, a member who is assigned to recruiting duties for his armed force may be reimbursed for actual and necessary expenses incurred in connection with those duties."

(b) The table of sections at the beginning of chapter 7 of such title is amended by adding at the end thereof the following new item:

"428. Allowance for recruiting expenses."

SEC. 206. Section 3 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2203) is amended to read as follows:

"SEC. 3. For the duration of this Act, section 403(a) of title 37, United States Code, is amended by striking out that part of the table which prescribes monthly basic allowances for quarters for enlisted members in pay grades E-1, E-2, E-3, and E-4 (four years' or less service) and inserting in lieu thereof the following:

"E-4 (four years' or less service)-----	\$81.60	\$121.50
E-3-----	72.30	105.00
E-2-----	63.90	105.00
E-1-----	60.00	105.00".

SEC. 207. Section 4 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2204) is amended by inserting immediately before "": Provided further" the following: "; or (7) for the calendar months in which such member serves on active duty for training (including full-time duty performed by members of the Army or Air National Guard for which they receive pay from the United States in accordance with section 204 of title 37, United States Code, if that training is for a period of 30 days or more."

SEC. 208. Section 7 of the Dependents Assistance Act of 1950 (50 App. U.S.C. 2207) is amended by striking out "to enlisted members on

active duty for training under section 262 of the Armed Forces Reserve Act of 1952, as amended (50 U.S.C. 1013), or any other enlistment program that requires an initial period of active duty for training."

SEC. 209. The foregoing provisions of this title shall become effective on October 1, 1971, except that section 203 shall become effective on such date as shall be prescribed by the Secretary of Defense, but not earlier than February 1, 1971, and section 206 shall become effective July 1, 1971.

SEC. 210. The enactment of this title shall not reduce the pay to which any member of the uniformed services was entitled on June 30, 1971.

SEC. 211. Not later than June 30, 1972, the Secretary of Defense shall report to the Chairmen of the Armed Services Committees of the Senate and of the House of Representatives on the effectiveness of the provisions of this title in increasing the number of volunteers enlisting for active duty in the Armed Forces of the United States.

TITLE III—ACTIVE DUTY STRENGTH LEVELS FOR FISCAL YEAR 1972

SEC. 301. For the fiscal year beginning July 1, 1971, and ending June 30, 1972, each of the following armed forces is authorized an average active duty personnel strength as follows:

- (1) the Army, 974,309;
- (2) the Navy, 613,619;
- (3) the Marine Corps, 209,846; and
- (4) the Air Force, 755,635;

except that such ceilings shall not include members of the Ready Reserve of any armed force ordered to active duty under the provisions of section 673 of title 10, United States Code, members of the Army National Guard, or members of the Air National Guard called into Federal service under section 3500 or 8500, as the case may be, of title 10, United States Code, or members of the militia of any State called into Federal service under chapter 15 of title 10, United States Code. Whenever one or more units of the Ready Reserve are ordered to active duty after the date of enactment of this section, the President shall, beginning with the second fiscal year quarter immediately following the quarter in which the first unit or units are ordered to active duty and on the first day of each succeeding six-month period thereafter, so long as any such unit is retained on active duty, submit a report to the Congress regarding the necessity for such unit or units being ordered to active duty. The President shall include in each such report a statement of the mission of each such unit ordered to active duty, an evaluation of such unit's performance of that mission, where each such unit is being deployed at the time of the report, and such other information regarding each such unit as the President deems appropriate.

TITLE IV—TERMINATION OF HOSTILITIES IN INDOCHINA

SEC. 401. It is hereby declared to be the sense of Congress that the United States terminate at the earliest practicable date all military operations of the United States in Indochina, and provide for the prompt and orderly withdrawal of all United States military forces at a date certain subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government, and an accounting for all Americans missing in action who have been held by or known to.

such Government or such forces. The Congress hereby urges and requests the President to implement the above expressed policy by initiating immediately the following actions:

(1) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(2) Negotiate with the Government of North Vietnam for the establishing of a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release at a date certain of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina subject to a corresponding series of phased releases of American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established pursuant to paragraph (2) hereof.

TITLE V—IDENTIFICATION AND TREATMENT OF DRUG AND ALCOHOL DEPENDENT PERSONS IN THE ARMED FORCES

SEC. 501. (a) The Secretary of Defense shall prescribe and implement procedures, utilizing all practical available methods, and provide necessary facilities to (1) identify, treat, and rehabilitate members of the Armed Forces who are drug or alcohol dependent persons, and (2) identify those individuals examined at Armed Forces examining and entrance stations who are drug or alcohol dependent persons. Those individuals found to be drug or alcohol dependent persons under clause (2) of the preceding sentence shall be refused entrance into the Armed Forces and referred to civilian treatment facilities.

(b) The Secretary of Defense shall report to Congress within 60 days after the date of the enactment of this Act with respect to (1) the plans and programs which have been initiated to carry out the purposes of subsection (a) of this section, and (2) such recommendations for additional legislative action as he deems necessary to combat effectively drug and alcohol dependence in the Armed Forces and to treat and rehabilitate effectively any member found to be a drug or alcohol dependent person.

TITLE VI—APPOINTMENT OF CERTAIN REGULAR, TEMPORARY, AND RESERVE OFFICERS TO BE MADE SUBJECT TO THE ADVICE AND CONSENT OF THE SENATE

SEC. 601. Section 593(a) of title 10, United States Code, is amended to read as follows:

“(a) Appointments of Reserves in commissioned grades below lieutenant colonel and commander, except commissioned warrant officer, shall be made by the President alone. Appointments of Reserves in commissioned grades above major and lieutenant commander shall be made by the President, by and with the advice and consent of the Senate, except as provided in section 3352 or 8352 of this title.”

SEC. 602. Section 3447(b) of title 10, United States Code, is amended to read as follows:

"(b) Temporary appointments of commissioned officers in the Regular Army shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades of lieutenant colonel and above. Temporary appointments of commissioned officers in the reserve components of the Army shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades above major."

SEC. 603 (a) The second sentence of section 5597 (e) of title 10, United States Code, is amended to read as follows: "Such appointments shall be made by the President alone, except that appointments under subsections (f) and (g) in grades above lieutenant commander in the Navy shall be made by the President, by and with the advice and consent of the Senate."

(b) The second sentence of section 5787 (e) of such title is amended to read as follows: "Each such appointment to a grade above lieutenant commander in the Navy or to a grade above major in the Marine Corps shall be made by the President, by and with the advice and consent of the Senate."

(c) The first sentence of section 5791 (b) of such title is amended to read as follows: "Permanent and temporary appointments under this chapter in a grade above lieutenant commander in the Naval Reserve and in a grade above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate."

(d) The first sentence of section 5912 of such title is amended to read as follows: "Permanent and temporary appointments under this chapter in grades above lieutenant commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate."

SEC. 604. Section 8447(b) of title 10, United States Code, is amended to read as follows:

"(b) Temporary appointments of commissioned officers in the Regular Air Force shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades of lieutenant colonel and above. Temporary appointments of commissioned officers in the reserve components of the Air Force shall be made by the President alone in grades below lieutenant colonel and by the President, by and with the advice and consent of the Senate, in grades above major."

SEC. 605. Section 275(f) of title 14, United States Code, is amended by inserting the following sentence after the second sentence: "An appointment under this section to a grade above lieutenant commander of an officer in the Coast Guard Reserve shall be made by the President, by and with the advice and consent of the Senate."

TITLE VII—MISCELLANEOUS PROVISIONS

SEC. 701. Section 412(d)(2) of Public Law 86-149, as amended, is amended by (1) striking out "the President" and substituting in lieu thereof "the Secretary of Defense", (2) striking out "January 31" and substituting in lieu thereof "March 1", and (3) adding at the end thereof the following: "Such justification and explanation shall specify in detail for all forces, including each land force division, carrier and other major combatant vessel, air wing, and other comparable unit: (A) the unit

mission and capability, (B) the strategy which the unit supports, and (C) the area of deployment and illustrative areas of potential deployment, including a description of any United States commitment to defend such areas. Such justification and explanation shall also include a detailed discussion of the manpower required for support and overhead functions within the Armed Services."

And the Senate agree to the same.

F. EDW. HÉBERT,
MELVIN PRICE,
O. C. FISHER,
CHARLES E. BENNETT,
MR. ARENDS,
ALVIN E. O'KONSKI,
MR. BRAY,

Managers on the Part of the House.

JOHN C. STENNIS,
HENRY M. JACKSON,
HARRY F. BYRD, Jr.,
MARGARET CHASE SMITH,
STROM THURMOND,
JOHN TOWER,
PETER H. DOMINICK,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6531), an act to amend the Military Selective Service Act of 1967; to increase military pay; to authorize military active duty strengths for fiscal year 1972; and for other purposes, submit the following joint statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The House, on April 1, 1971, passed and sent to the Senate H.R. 6531, which extended the induction provisions of the Military Selective Service Act of 1967 and related authorities for a period of two years, from July 1, 1971, to July 1, 1973. The bill also authorized increases in basic pay and basic allowance for quarters and subsistence and set the authorized strength of the active-duty forces for the fiscal year beginning July 1, 1971.

The Senate, on June 24, 1971, amended H.R. 6531 by striking all after the enacting clause and substituting new language in the form of an amendment.

As a consequence of Senate action, there existed 28 major differences in the House and Senate versions of H.R. 6531. The majority of differences involved amendments added by the Senate for which there were no comparable provisions in the House bill. Each of the differences is identified below, together with an explanation of the action taken thereon in the conference report to resolve the difference.

Difference No. 1

The Senate bill provided a ceiling of 130,000 on inductions in fiscal year 1972 and 140,000 on inductions in fiscal year 1973 and provided that these inductions can be exceeded only by Congressional authorization.

The House bill contained no similar provision. The House conferees were satisfied that the ceilings imposed were consistent with the planned inductions for the fiscal years concerned. They agreed that the ceilings could be raised by statute if such were found to be necessary. They also agreed that this legislative ceiling, combined with the legislative ceiling on the authorized annual average strengths for military manpower, would provide an important degree of legislative control over military manpower and should prevent a large increase in military manpower without Congressional approval.

The House conferees believe the induction limitation is consistent with the philosophy of the Executive Branch's efforts to move towards an all-volunteer force. The House, therefore, accepted the Senate amendment.

Difference No. 2

The Senate version contained a provision, referred to as the Mansfield Amendment, which declared it to be the policy of the United

States to terminate all military operations of the United States in Indochina at the earliest practicable date and to provide for withdrawal of all U.S. military forces not later than nine months after the date of enactment, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government.

To effect such policy, the provision urges and requests the President to:

- (1) Establish a final date for withdrawal from Indochina of all U.S. forces contingent upon release of prisoners of war, such date to be not later than nine months after enactment;

- (2) Negotiate with North Vietnam for an immediate cease-fire;

- (3) Negotiate with North Vietnam for a series of phased withdrawal of U.S. forces in exchange for a corresponding series of phased releases of American prisoners of war, with withdrawal of all forces and release of all prisoners not later than date set by President under No. (1) above or an earlier date agreed on by negotiation.

The Senate had voted in favor of the deadline in the Mansfield Amendment.

The House bill contained no such provision. On the contrary, the House has, on several occasions, rejected the idea of a specific deadline for withdrawal of U.S. troops from Vietnam. On the day that the House agreed to send H.R. 6531 to conference, June 28, 1971, the House specifically rejected a motion to instruct the conferees to accept the Mansfield Amendment.

In view of this vote and in view of the several previous instances when the House had rejected legislative amendments similar to the Mansfield Amendment, the House conferees vigorously opposed the Mansfield Amendment in its initial form and were adamant in upholding the will of the House. The Senate conferees were equally insistent on the position of the Senate and on inclusion of the substance of Mansfield Amendment as a prerequisite for final approval of the bill.

The conferees, therefore, debated this issue for an extended period; and the majority of the seven meetings held during the month that the legislation was in conference were devoted solely to this one provision.

On July 1 the conferees announced agreement on all of the other 27 differences, and the meetings since that time have been devoted to the Mansfield Amendment.

The conferees have agreed to the language of Title 5 as it appears in the conference report.

The language of the conference report expresses the provision as the sense of Congress rather than the policy of the United States. The conferees believe this language is more appropriate to properly reflect a policy position being taken by the Congress.

The provision, therefore, expresses the sense of Congress that the United States terminate at the earliest practicable date all U.S. military operations and provide for withdrawal of U.S. forces at a date certain subject to release of all American prisoners of war and an accounting for American missing.

The House conferees pointed out that the original language referred only to prisoners of war held by the Government of North Vietnam and forces allied with such government and was silent on Americans

missing in Southeast Asia. More than three-fourths of the more than 1,600 American servicemen listed by the Department of Defense as prisoners of war or missing in Southeast Asia have never been accounted for by the other side. The Department of Defense has indicated there are over 375 men held in North Vietnam, in addition to more than 80 held in South Vietnam and several in Laos. However, the other side, in official statements, has accounted for less than 360. Only one man of all those missing in South Vietnam has been permitted to communicate with his family, and no list of prisoners has ever been furnished by the Viet Cong. An accounting for the missing, therefore, as well as release of acknowledged prisoners of war, will be necessary to end the ordeal of missing Americans and the anguish suffered by their families. The conferees, therefore, agreed to language which makes the orderly withdrawal of U.S. military forces at a date certain subject to the release of American prisoners of war by North Vietnam and forces allied with North Vietnam and "an accounting for all Americans missing in action who have been held by, or known to, such government or such forces."

In carrying out the intent of the provision the President is urged and requested by the language of the conference report to negotiate for an immediate cease-fire, to negotiate for establishing a final date for withdrawal of all U.S. forces contingent upon release of all American prisoners, and to negotiate for an agreement which would provide a series of phased and rapid withdrawals subject to a series of phased releases of American prisoners of war. As part of the latter negotiations would be the release of any remaining Americans held concurrent with withdrawal of all remaining U.S. military forces by a date not later than a date established by the President or such earlier date as agreed upon by negotiating parties. This language deletes the setting of a date nine months after enactment as proposed in the original amendment, however, the conferees agreed that it was imperative to emphasize negotiations to establish a cease-fire since such could bring a termination of the killing in Southeast Asia at the earliest date.

Difference No. 3

The House bill approved the strength authorization requested by the Administration for fiscal year 1972 of 2,609,409.

The Senate version provided for a reduction in the authorization of 56,000 below that authorized by the House. Thus the strength authorized by the Senate amendment is 2,553,409. The reduction imposed by the Senate language would reduce the Air Force's average strength by 3,000 for fiscal year 1972, the Navy's strength by 3,000, and the Army's strength by 50,000. The conferees agreed that the strength reductions could be absorbed by the Armed Forces in light of the reductions being made in U.S. forces in Vietnam.

Under the Senate version of the bill the authorized ceiling may be exceeded by the President acting alone only if he calls up Reserves.

The House conferees accepted the personnel strength limitations recommended by the Senate with, however, a clarifying House amendment. The amendment simply makes clear the right of the President to order to active duty National Guard and Reserve personnel to cope with civil disturbances, etc., without regard to the personnel ceiling limitations contained in this provision of the bill.

The conferees agreed that this legislative ceiling, combined with the legislative ceiling on inductions, would help assure that if the President finds it necessary to make rapid military manpower increases in a future emergency, he would do so only by calling Reservists to active duty.

Difference No. 4

The House bill provided for an automatic third year of alternate service for conscientious objectors as recognition of the additional Reserve service incurred by a two-year draftee. The House bill also provided for the induction of conscientious objectors who do not satisfactorily perform their assigned alternate civilian service. Finally, the House bill provided that the program of alternate work or service to be performed by the conscientious objectors be established and supervised under regulations issued by the President and administered by the Director of Selective Service. This latter provision represents a departure from present practice which places responsibility for assigning work to a local draft board and responsibility for monitoring the individual's performance to the State Director of Selective Service. This provision reflects the belief that national requirements for workers of this kind exceed the number of individuals to be granted conscientious objector classification and that assignment of personnel on a national basis under the supervision of the Director of Selective Service can provide the flexibility for effective and full utilization of conscientious objectors in alternate civilian service.

The Senate amendments required conscientious objectors to be available for a third year of alternate service only if Reserves are called up in time of national emergency. The Senate language further prohibited induction of conscientious objectors in cases where a claim for conscientious objector status is filed after an induction notice is received.

After extensive discussion, the conferees of both bodies receded from their positions.

The conferees agreed to accept an amendment proposed by the House conferees which removes any requirement for a third year of alternate service but retains the House provision allowing for assignment and monitoring of conscientious objectors to alternate service by the Director of Selective Service. The Senate conferees accepted this amendment with the understanding that the Director of Selective Service may draw heavily on the experience and the recommendations of the local boards and State Directors in assigning conscientious objectors to alternate service and that local arrangements under which alternate service is now performed with religious and other organizations will not be needlessly disrupted.

The Committee of Conference emphasizes its belief that the young man who is granted the classification of conscientious objector (I-O) and is then assigned to alternative civilian service may be required to parallel in his experiences, to a reasonable extent, the experiences of the young man who is inducted in his stead. The inductee leaves home, gives up his current civilian pursuits, and is sent to some distant place with seldom an opportunity to more than briefly return home during his course of service. He subjects himself to a rigorous life, many times under the most uncomfortable of conditions, and at the risk of life and limb. He is governed throughout the period of service by a system of rules and regulations, the disregard of which subjects

him to various disciplinary measures including fines and prison. Where he performs his duties is dictated by national needs, not personal desires.

Obviously, a civilian work program for a conscientious objector can not entail even a reasonable facsimile of the many burdens which are placed upon the inductee who took the conscientious objector's place in combat and may have given his life. The Committee is therefore adamant in its view that the Selective Service System should place the conscientious objector in an alternative work program which genuinely contributes to meeting valid national requirements for work that conscientious objectors are capable of performing, regardless of the location of such work.

The House conferees were adamant in their opposition to a Senate amendment which would have prohibited the induction of registrants who filed a claim of conscientious objection after receipt of their induction notice. Therefore, the Senate receded with the understanding that in unusual cases, local boards would have the discretionary authority of extending to such registrants a hearing on their late claim if the circumstances so warranted.

It should be stressed that the language of the conference report retains the existing statutory language defining a conscientious objector. This statutory language has been subjected to intense legal scrutiny and interpretation by the United States Supreme Court. Therefore, no purpose would be served by rewriting this language to invite further unnecessary litigation.

Difference No. 5

The House bill and the Senate amendment thereto differed substantially in their provisions relating to military pay.

The House bill provided substantial increases in basic pay, primarily for draftees and other men with less than two years of service, and also provided substantial increases in quarters allowance or Dependents Assistance Allowance for all personnel, the first such increase since 1963. The basic pay increases of the House bill would have an annual cost of \$1,825.4 million. The quarters allowance increase of the House bill would have an annual cost of \$640.1 million; the Dependents Assistance Allowance increase, an annual cost of \$184.1 million. The House bill included no authority for an initial enlistment bonus.

The Senate amendment provided higher increases in basic pay for members of the uniformed services, at a total annual cost of \$2,667 million. On the other hand, the Senate bill provided no increase in Basic Allowance for Quarters; it provided an increase totaling \$79 million annually in the Dependents Assistance Allowance for junior enlisted personnel. The Senate amendment authorized the payment of an initial enlistment bonus of up to \$6,000 for up to 6 years of service, as recommended by the Administration.

The administration has proposed a \$908 million basic-pay increase in fiscal year 1972, a \$79 million increase in Dependents Assistance Allowance, and no increase in Basic Allowance for Quarters for fiscal year 1972. The Administration's proposal was defined as the first step of a two-step increase with additional basic-pay increases and substantial increases in Basic Allowance for Quarters to be requested in fiscal year 1973. The House bill essentially incorporated the fiscal

year 1972 and fiscal year 1973 Administration proposals in the belief that the full increases were required in fiscal year 1972 if the Armed Forces were to have a reasonable chance of moving towards an all-volunteer force within two years. The Senate amendment as regards pay essentially carried out the recommendations of the Gates Commission, a Presidential commission which had made a series of recommendations for pay increases as part of a proposal for an immediate move to an all-volunteer force.

After extensive discussion, both houses receded from their position and the conferees agreed on a compromise on the three major pay issues which includes the following:

(1) The basic-pay increase of the House bill, totaling \$1,825.4 million on an annual basis;

(2) A substantial portion of the Basic Allowance for Quarters increase proposed in the House bill, at a total cost of \$409.8 million on an annual basis; and Dependents Assistance Allowance increases totaling \$105.9 million on an annual basis. The House bill would have moved the Basic Allowance for Quarters and Dependents Assistance Allowance up to 100 percent of a proposed military standard which was based on FHA standards for comparable income groups. The compromise will raise Basic Allowance for Quarters and Dependents Assistance Allowance to 85 percent of that standard.

(3) Authority for an initial enlistment bonus providing for a first-enlistment bonus of up to \$3,000 for individual enlistees for three years of service with the bonus limited to individuals enlisting or extending their period of obligated service in the combat elements. The authority to pay such bonus is temporary in nature and will expire on June 30, 1973.

The conferees reached the following compromise on their other differences in the compensation section of the legislation:

The House bill had provided for special pay for optometry officers in the Armed Forces on a graduated scale of \$50 per month for optometrists in the grades of O-1, O-2 and O-3; \$150 per month for those in pay grades O-4 and O-5; and \$200 per month in pay grades O-6 and above. The Senate amendment had provided special pay for optometry officers at a flat rate of \$100 per month regardless of grade. Information from the Department of Defense indicated that the inadequacy of the military officers' salary structure to attract and retain optometrists was most apparent in the earliest years of service and that the greatest retention value would accrue from having the bulk of special pay go to young optometry officers. The conferees emphasized that the extra pay should not be considered a precedent for authorizing additional special pay for other categories of officers.

The House, therefore, recedes.

The House bill had included Dependents Assistance Allowance payments for Reservists as requested by the Administration at an annual cost of \$20 million. The Senate amendment had deleted this provision.

The Senate recedes.

The House bill had included a slight increase in Basic Allowance for Subsistence at a total annual cost of \$37.8 million. The Senate amendment had deleted this increase.

The House recedes.

The following table compares the provisions agreed to by the conferees with the proposals of the House and Senate and the original Administration proposal:

H.R. 6531—PAY PROVISIONS OF BILL AGREED TO BY CONFEREES, BASED ON A FULL-YEAR COST FOR FISCAL YEAR 1972

[In millions of dollars]

	Administra- tion proposal	House proposal	Senate proposal	Agreed to by conferees
Basic pay.....	908.0	1,825.4	2,667.0	1,825.4
DAA.....	79.0	184.1	79.0	105.9
BAQ.....	0	640.1	0	409.8
BAS.....	0	37.8	0	0
Enlistment bonus.....	40.0	0	40.0	20.0
Recruiter expenses.....	2.9	2.9	2.9	2.9
Optometrists.....	0	.5	.6	.6
DAA reservists.....	20.0	20.0	0	20.0
Annual total.....	1,049.9	2,710.8	2,789.5	2,384.6

The conferees agreed that the pay provisions, except for DAA, of the legislation shall be effective on October 1, 1971. On this basis the fiscal year 1972 cost of the compensation increases will be \$1,788.3 million, \$738.4 million above the amount allotted for such purpose in the President's proposed fiscal 1972 budget. The members of the Conference Committee wish to point out that military personnel received a pay increase in January 1971, and are scheduled to receive another such automatic increase in January 1972. Thus, with the provisions of the present legislation, effective October 1, there will be three pay increases provided military personnel in a period of 13 months.

The Committee on Conference believes that the compensation package as agreed upon is a balanced program. It concentrates most of its increase in first-term pay, while at the same time providing substantial increases in income for careerists which should have favorable impact on long-term retention. By providing increases in allowances which are nontaxable, the conference report increases the take-home pay over what would have been available to military personnel if all increases had been in basic pay. The conferees believe that the legislation will truly provide military personnel, at all grades, with realistic and competitive levels of pay which bears a sound relationship to civilian wages for equivalent levels of work and responsibility.

In the final analysis the effectiveness of the compensation increases in attracting and retaining career personnel will be most accurately reflected in the increase in income available to the individual. The following table, therefore, compares the regular military compensation for representative examples of various pay grades made available by the House and Senate bills and finally by the conference report as compared to present rates.

COMPARISON OF AVERAGE ANNUAL REGULAR MILITARY COMPENSATION¹

Pay grade	House bill	Senate bill	Conferees' agreement	Present (Jan. 1, 1971) rates
Colonel/captain O-6.....	\$27,197	\$24,850	\$26,389	\$24,850
Lieutenant colonel/commander O-5.....	21,821	19,796	21,122	19,796
Major/lieutenant commander O-4.....	18,234	16,527	17,630	16,527
Captain/lieutenant O-3.....	15,025	13,591	14,501	13,516
1st lieutenant/lieutenant (jg) O-2.....	11,474	11,138	11,045	10,166
2d lieutenant/ensign O-1.....	8,985	9,611	8,659	7,807
Chief warrant/commissioned warrant W-4.....	17,653	16,088	17,074	16,088
Chief warrant/commissioned warrant W-3.....	14,537	13,097	14,023	13,097
Chief warrant/commissioned warrant W-2.....	12,299	11,108	11,859	11,104
Warrant officer/warrant officer W-1.....	10,138	9,195	9,738	9,033
Sergeant major/master chief petty officer E-9.....	14,919	13,417	14,392	13,417
Master sergeant/senior chief petty officer E-8.....	12,812	11,571	12,334	11,571
Sergeant/1st class chief petty officer E-7.....	11,063	9,980	10,634	9,980
Staff sergeant/petty officer 1st class E-6.....	9,550	8,647	9,160	8,611
Sergeant/petty officer 2d class E-5.....	7,691	7,248	7,356	6,889
Corporal/petty officer 3d class E-4.....	6,457	6,329	6,189	5,253
Pfc/seaman E-3.....	5,893	5,831	5,663	3,931
Private/seaman apprentice E-2.....	5,484	5,530	5,311	3,345
Recruit/seaman recruit E-1.....	5,036	5,320	4,872	3,165

¹ Regular military compensation is defined as basic pay, basic allowances for quarters, basic allowances for subsistence and the tax advantage which accrues because the allowances are not subject to Federal income tax.

Difference No. 6

Both the House and Senate versions of H.R. 6531 restore to the President discretionary authority over student deferments.

The President has announced his intention to withdraw student deferments from all those who received them after April 23, 1970, the date on which the President announced his intentions to request from Congress authority to eliminate such deferments.

Under the House bill the President would have complete discretion to withhold or grant student deferments as of any date he sets.

The Senate amendments would prohibit the President from removing deferments retroactively from those who met the educational requirements for them during the regular 1970-71 academic year. Under the Senate amendments, therefore, such students would be deferred until graduation, or reaching age 24, or ceasing to pursue their course of study satisfactorily, whichever comes first. The President would, under the Senate version of the bill, have authority to eliminate student deferments for those who enter college in the summer of 1971, or later.

The Senate conferees were adamant in their views on this matter; and the House conferees, therefore, reluctantly receded and accepted the Senate language.

Difference No. 7

The House bill expanded the exemption presently in law for sole-surviving sons to include all members of a family if a father or brother or sister has been killed in action or died in the line of duty or subsequently dies or is totally disabled as a result of injury or disease incurred during service.

The Senate version provided that no person may be inducted who has lost a member of his immediate family through service in the Armed Forces or who subsequently died as a result of injuries received or

disease incurred in the line of duty. The Senate version also provided that any surviving son or sons serving on active duty with the Armed Forces who were inducted and who would have been eligible for exemption from induction under the language of this provision may, upon application, be promptly discharged from the Armed Forces.

The conferees agreed to accept the Senate language with an amendment providing the sister or brother must be "of the whole blood" and providing further that the exemption applies in the case of family members lost subsequent to December 31, 1959. The language accepted by the conferees also retained the existing "sole-surviving son" exemption for those registrants who qualify on the basis of a loss of a member prior to December 31, 1959.

Difference No. 8

The House did not change current law which provides exemption from induction for divinity students.

The Senate amendment changed the status of divinity students from an exemption to a statutory deferment, making divinity students technically liable to service until age 35 if, for one reason or another, they do not pursue a career in the ministry until they reach that age. The exemption for ministers was left substantively unchanged.

Without the provisions of the Senate bill a divinity student would not be liable to the draft after he reached age 26, and it would therefore be possible to remain in divinity school until that point and then pursue some career other than the ministry and thereby avoid an obligation to military service.

The House conferees agreed that the Senate language more clearly carried out the basic intent of Congress in providing divinity students freedom from their military obligation on the assumption that they were going to practice in the ministry subsequent to their completion of training for the ministry.

The House, therefore, recedes.

Difference No. 9

The House bill prohibited the collocation and consolidation of local draft boards.

The Senate version provided that local boards may be either consolidated or collocated, but only after the approval by the governor of the state.

The Director of Selective Service informed the conferees that the House provisions would require the creation of 340 new local boards in sparsely populated counties, most of which have never had a board even during full mobilization. This would involve recruiting and training a minimum of 2,600 additional uncompensated personnel to serve as board members, government appeal agents and medical advisers and would require the establishment of 340 new offices.

However, the Director of Selective Service assured the conferees that even should the Senate language be adopted, there are no current plans to resume the nationwide collocation of boards across county lines, halted with the passage of the House bill.

The House, therefore, recedes.

Difference No. 10

The Senate amendment contained a provision relating to reentry rights into college whenever practicable for veterans who had been earlier inducted into the Armed Forces. Another provision would have

made available government funds to pay counseling personnel for veterans in college who desire to participate in a counseling program.

The House bill contained no similar provisions.

The House conferees pointed out that these provisions, which had not been subject to hearings in either house, were outside the jurisdiction of the House Armed Services Committee and that, if desirable, they should be subject to the consideration of the Veterans' Affairs Committee which has jurisdiction in this legislative area.

The House conferees were adamant in their views on this matter and the Senate conferees, therefore, reluctantly receded.

Difference No. 11

The Senate amendment contained language providing for simultaneous registration to vote in Federal elections for 18-year-old men at the time they register for service, with a proviso that a governor might veto such voter registration for his state.

The House bill contained no similar provision.

The conferees were advised by the Director of Selective Service that the provision would cause severe administrative difficulties for the Selective Service System.

The House conferees, therefore, refused to accept the Senate amendment; and the Senate conferees, therefore, reluctantly receded.

Difference No. 12

The Senate amendment added two separate titles to the bill, Titles 5 and 6, to provide for the identification and treatment of drug and alcohol dependent persons in the Armed Forces and other measures relating to international drug traffic.

The House bill contained no similar provisions.

The language of the Senate amendment contained:

1. A statement of findings concerning the prevalence of drug and alcohol dependency in the Armed Forces;
2. Provisions to encourage drug and alcohol dependent persons to seek treatment and rehabilitation, and to provide such treatment and rehabilitation through Armed Forces facilities and personnel trained to deal with drug-dependent persons;
3. Findings of fact and requirements for periodic reports to Congress concerning international heroin and narcotic drug control.

The House conferees argued that the language of the Senate amendment could create considerable administrative difficulty for the Department of Defense in its present form. The language provided that drug and alcohol dependent persons "shall not be subject to disciplinary or other punitive action based on information given in seeking or receiving such assistance"—that is, treatment and rehabilitation. The House conferees pointed out that this language constituted a grant of amnesty for prosecution for whatever crimes or offenses which may be disclosed during treatment or rehabilitation, without regard to whether such offenses are related to drug or alcohol use. The amendment established a medical officer-patient privileged communication status for drug and alcohol dependent persons. The House conferees argued that this medical confidentiality provision could result in difficulty for the military services in obtaining full information as to the physical and mental capacity of its members and conflicted with the rules of evidence established for trials by courts-martial.

The Senate language also precluded the discharge for an unlimited period of time of any drug or alcohol dependent person who is responding to treatment and provided that a member in such an instance who has fulfilled his service obligation may not be discharged unless he requests it. The House conferees pointed out that the language of the Senate amendment conflicted with certain provisions of Title 10 of the United States Code.

The House has not had the benefit of hearings on or prior study of these provisions. Because of their broad implications and because of the importance and complexity of the issues involved, the House conferees could not support the language of the Senate amendment in the form in which it was brought to conference.

The House conferees pointed out that an issue of such serious nature and such complexity deserved to be treated fully in separate legislation rather than solely in a limited way as an amendment to legislation in another area. Adequate study and hearings by the appropriate committees by both houses should precede the adoption of detailed legislation on the drug and alcohol dependency problem.

On the other hand, the conferees of both houses were unanimous in their concurrence that drug abuse is a profoundly serious national problem that is having a grave effect on the Armed Forces.

The Senate conferees, therefore, after extensive discussion, receded from their amendment and the conferees of both houses concurred in a more limited amendment to read as follows:

SEC. 401. (a) The Secretary of Defense shall prescribe and implement procedures, utilizing all practical available methods, and provide necessary facilities to (1) identify, treat, and rehabilitate members of the Armed Forces who are drug or alcohol dependent persons, and (2) identify those individuals examined at Armed Forces examining and entrance stations who are drug or alcohol dependent persons. Those individuals found to be drug or alcohol dependent persons under clause (2) of the preceding sentence shall be refused entrance into the Armed Forces and referred to civilian treatment facilities.

(b) The Secretary of Defense shall report to Congress within 60 days after the date of the enactment of this Act with respect to (1) the plans and programs which have been initiated to carry out the purposes of subsection (a) of this section, and (2) such recommendations for additional legislative action as he determines necessary to combat effectively drug and alcohol dependence in the Armed Forces and to treat and rehabilitate effectively any member found to be a drug or alcohol dependent person.

The conferees desire that the language of the conference report as adopted be considered an interim step. It requires that positive action be undertaken by the Armed Forces toward identifying, treating and rehabilitating members of the Armed Forces who are drug or alcohol dependent persons and at the same time provides for a report to the Congress by the Secretary of Defense within 60 days after the enactment of this Act with plans and programs initiated and with recommendations for such additional legislative authority as may be required. In addition to requiring the Department of Defense to commence treatment and rehabilitation programs, this provision provides for a report to the Congress which will be of great benefit to the appropriate committees of each house in their study of possible further legislative action.

The conferees of both houses believe that additional effective legislation will probably be necessary to combat the serious drug-abuse problem in the Armed Forces and that consideration of such legislation should commence at the earliest practical date.

The conferees on the part of both houses have, therefore, agreed to the language in the conference report with the understanding that it is to be a prelude to further legislative action by the respective Armed Services Committees in the 92d Congress.

Difference No. 13

The Senate bill contained a provision stating that no regulation issued under this act shall become effective until 30 days after the date on which such regulation has been in the federal register.

The House bill contained no such provision.

The House conferees agreed that the provision was in the interest of equity and, therefore, accepted the Senate language.

Difference No. 14

The Senate version of the bill provided a series of procedural reforms in the Selective Service System which would have guaranteed to each registrant asserting a claim before a local or appeal board a series of procedural rights as follows:

1. The opportunity to appear in person before any local or appeal board;
2. The right to present witnesses before a local board;
3. Attendance of a quorum of any local or appeal board during a registrant's personal appearance;
4. A written report upon request when a local or appeal board has rendered a decision adverse to the claim of a registrant; and
5. The right to be accompanied and advised by private counsel at a personal appearance before a local or appeal board.

The House bill contained no similar provisions.

The House conferees expressed the concern that some of these provisions would prevent Selective Service boards from carrying out their functions in an expeditious manner and might encourage harassing and delaying tactics by those desiring to disrupt the effective functioning of the Selective Service System. After extensive discussion the House conferees agreed to accept the Senate amendments with regard to items 1, 2, 3 and 4. The Senate conferees pointed out that under the language of their amendment these rights would be granted pursuant to such rules and regulations as the President may prescribe and the regulations under which the rights were granted should be drafted in such a way as to preclude abuses and obvious delaying tactics. The Senate conferees pointed out further that the right to present witnesses is specifically subject under their amendment "to reasonable limitations on the number of witnesses and the total time allotted to each registrant."

With the understanding, therefore, that the regulations implementing these provisions will be drafted in such a way as to protect the orderly and efficient functioning of the Selective Service System and not result in an unreasonable burden on local draft boards, the House accepted the Senate position on items 1-4.

The conferees agreed that granting the right of counsel at appearances before local and appeal boards would require an unacceptable increase in the workload of local boards, could not reasonably be

instituted without the retention of an extensive legal apparatus to provide attorneys for each local board, and might result in inequities to registrants, giving an advantage to those whose economic status makes it easier for them to obtain counsel.

The Senate, therefore, recedes.

Difference No. 15

The House bill provided that to the extent practicable the members of a local draft board "shall accurately represent the economic and sociological background of the population which they serve but no induction shall be declared invalid on the ground that any board failed to conform to any particular quota as to race, economics, religion, sex or age." The bill provided this requirement shall be fully implemented by January 1, 1972.

The Senate version contained language providing that in making future local board appointments the President is requested to see that to the maximum extent practicable a board "is proportionately representative of the race and national origin of those registrants within its jurisdiction, but no action by any local board shall be declared invalid on the ground that any board failed to conform to any particular quota as to race or national origin."

The Selective Service System has been meeting with success in its efforts to date to increase minority membership on local boards. The conferees agreed that the Senate language would be sufficient to ensure continued movement in the direction of desirable representation on local boards and would, with the absence of an arbitrary deadline, be easier to administer.

The House recedes.

Difference No. 16

The Senate version contained language providing that physicians who serve for four years in doctor-shortage areas would be relieved of liability under the Selective Service Act.

The House bill contained no similar provision.

The House conferees pointed out that existing provisions in the law provide for occupational deferments when these are required in the national interest and that the President could utilize this authority for selected deferment of physicians if he so chooses.

The Senate, therefore, recedes.

Difference No. 17

The Senate amendment contained a requirement for four separate reports and studies to be made by the Executive Branch and to be provided to the Congress.

The House bill contained no such provision.

The House conferees agreed to accept the Senate provision for two of these studies, a joint Department of Defense—Department of Health, Education and Welfare study of military use of civilian medical facilities and a study of the effectiveness of Title 2 of this Act in increasing the number of voluntary enlistments in the active-duty uniformed services of the United States. A study presently underway in the Department of Defense on use of civilian medical personnel and facilities can be restructured to include Health, Education and Welfare. The Department of Defense agreed the study of the effect of compensation increases on the number of volunteers is desirable.

The other two items called for in the Senate version of the bill were a modification and explanation of the manpower report presently

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required of the Executive Branch and a study of military housing. The House conferees agreed to accept the requirement for an expanded manpower report subject to an amendment deleting the portion of the Senate language which required the justification and explanation of manpower requirements to include a statement of the way in which missions, capabilities, strategies and deployments would be affected by a 10-percent reduction in authorized strength for each service below that recommended in the budget for the next fiscal year.

This later requirement, the conferees believed, would force the Secretary of Defense to submit an alternative military program in conflict with the proposals of his President.

The House conferees pointed out that the issue of military housing was already the subject of a sufficient number of studies.

The Senate, therefore, recedes on this latter item.

Difference No. 18

The Senate version of the bill contained language prohibiting enlistment after an induction order has been issued.

The House bill had no similar provision, in effect retaining current law which prohibits enlistment after an induction order is received.

The House accepts the Senate language.

Difference No. 19

The Senate version contained a provision prohibiting job discrimination against American citizens and their dependents in hiring on United States military bases in any foreign country.

The House bill contained no such provision.

The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose dependents are effectively prevented from obtaining employment.

The House accepts the Senate provision.

Difference No. 20

The Senate amendment contained a provision that a high school senior who reached 20 years of age during his senior year be permitted to graduate prior to induction.

The House bill contained no similar provision.

Current law provides a deferment for a high school student until his 20th birthday or graduation whichever occurs first.

The House accepts the Senate provision.

Difference No. 21

The Senate amendment contained a provision establishing an intensive counseling program for high school students to be administered by the Selective Service.

The House bill contained no similar provision.

In the opinion of the House conferees, the amendment raised a question as to whether the Federal government could, or should, attempt to make schools abide by the provision and the conferees agreed that while such counseling could be provided by Selective Service when requested, a mandatory requirement in the law is undesirable.

The Senate recedes.

Difference No. 22

The Senate amendment contained language providing that if calls for induction are discontinued because the Armed Forces achieve an all volunteer basis, the Selective Service System shall be maintained as an active standby organization with personnel adequate to reinstitute immediately the full operation of the system, including military Reservists who are trained to operate such system and who can be ordered to active duty for such purpose in the event of a national emergency.

The House bill contained no similar provision.

The House accepts the Senate language.

Difference No. 23

The Senate amendment contained language requiring henceforth that appointment of Reserve officers of the rank of major/lieutenant commander and above be subject to the advice and consent of the Senate.

The House bill contained no similar provision.

The House conferees agreed to accept the Senate language with an amendment to apply the requirement uniformly to regular and Reserve officers and to limit the requirement to officers in the grade of lieutenant colonel/commander and above.

In substance, as a result of the amendment, temporary promotions in the grade of lieutenant colonel and above for both Regular and Reserve officers will be subject to Senate confirmation. Presently only those in the grade of general officer require this action.

In addition, permanent Reserve appointments in the grade of lieutenant colonel and colonel will be subject to Senate confirmation. The bill does not change existing law which requires confirmation for permanent promotions for Regular officers. It, therefore, makes uniform the system for all promotions for both components in the grades of lieutenant colonel and colonel.

Difference No. 24

The Senate amendment contained language providing that the National Advisory Committee of the Selective Service shall, in the performance of its function, give appropriate consideration to the needs of the civilian population, as well as the Armed Forces.

The House bill contained no similar provision.

The House conferees were able to persuade the Senate conferees that existing procedures within the Selective Service System now adequately provide for the purposes the Senate language is designed to achieve.

The Senate recedes.

Difference No. 25

The House language provides that aliens who claim nonpermanent status may remain in the United States for two years before being liable for service. The purpose of this language was to prevent non-resident aliens residing in the United States for periods in excess of 24 months from avoiding the requirements of the Selective Service law.

The Senate bill contained no such provision.

The Senate bill included four additions to the Act, proposed by the Administration, which had been rejected by the House. These four additions would provide induction exemption for the following four classes of aliens:

1. Aliens holding foreign-affairs-oriented occupations such as in a diplomatic or counselor capacity, or with a public international organization;

2. Aliens who are not in an exempted category but who are not yet residents in the United States for one year, so as to give the said alien sufficient time to acclimate to American culture and the English language;

3. Additional nonimmigrant aliens who are not now exempted from liability under the Selective Service Act, such as temporary workers, treaty traders, or investors, fiances of American citizens and temporary visitors for business or pleasure. Such persons, in point of fact, are not now subject to registration until after they have been in the United States for an extended period but the language was requested by the Department of State to clarify the law for foreign governments;

4. Any person who has served at least 12 months' active duty in the Armed Forces of a nation with which the United States is associated in mutual defense activities. The present legal requirement is 18 months.

The Senate conferees were able to persuade the House conferees that the Senate amendment was in the interest of equity for aliens.

The House recedes.

Difference No. 26

The law presently limits maximum length of service on local draft boards to 25 years.

The House bill would have reduced this to 15 years.

The Senate amendment compromised the limit at 20 years.

The House recedes.

Difference No. 27

The House bill provided an increase from \$50 to \$500 in travel pay for uncompensated Selective Service employees.

The Senate bill limited the increase to \$250.

The Senate recedes.

Difference No. 28

The House bill provided that a person who receives an induction order while pursuing a full-time course of instruction at a college, university or similar institution shall have his induction postponed until the end of the term or the academic year in the case of his last academic year.

The Senate amendment made a revision to provide the induction shall be postponed until "the end of the semester or term, or academic year in the case of his last academic year." The Senate amendment, therefore, simply adds the word "semester" to preclude any misconstruction of the word "term."

The House recedes.

In addition, the conferees wish to point out that the amendment extending the authority to induct persons for training and service is retroactively effective to July 2, 1971. The intent of the conferees in making the effective date retroactive is to provide that the period beginning July 2, 1971 and ending on the date of the enactment of H.R. 6531 be treated as an induction period solely for the purpose of insuring that there will be no lapse in the entitlement of any member of the armed forces, or his estate, to the Federal tax benefits which are available to servicemen and their states as a result of certain service during an induction period.

F. EDW. HÉBERT,
MELVIN PRICE,
O. C. FISHER,
CHARLES E. BENNETT,
Mr. LESLIE C. ARENDS,
ALVIN E. O'KONSKI,
Mr. WILLIAM G. BRAY,

Managers on the Part of the House.

JOHN C. STENNIS,
HENRY M. JACKSON,
HARRY F. BYRD, JR.,
MARGARET CHASE SMITH,
STROM THURMOND,
JOHN TOWER,
PETER H. DOMINICK,

Managers on the Part of the Senate.

23. SELECTIVE SERVICE SYSTEM REGULATIONS IMPLEMENTING 1971 AMENDMENTS TO SELECTIVE SERVICE ACT

SSS MATERIAL PUBLISHED IN FEDERAL REGISTER SINCE SEPT. 28, 1971

Date	Register No.	Subject	See also
Oct. 14, 1971	Vol. 36, No. 199; pp. 19963, 19964	Exec. Order No. 11623 delegating to Director of SS authority to issue rules and regulations under Military SS Act.	
Nov. 3, 1971	Vol. 36, No. 212; pp. 21072, et seq.	Proposed amendments to SS regulations.	Press Release No. 71-17—Nov. 2, 1971.
Nov. 4, 1971	Vol. 36, No. 213; pp. 21216, et seq.	Proposed amendments to SS regulations.	Do.
Nov. 5, 1971	Vol. 36, No. 214; pp. 21294, et seq.	Proposed amendments to SS regulations (Part 1660).	Do.
Nov. 10, 1971	Vol. 36, No. 217; pp. 21548, et seq.	LBM 99, as amended Nov. 3, 1971.	
Dec. 9, 1971	Vol. 36, No. 237; pp. 23372, et seq.	Effective SS Regulations (as of Dec. 10, 1971).	Press Release No. 71-20 dated Dec. 10, 1971.
Jan. 12, 1972	Vol. 37, No. 7; pp. 479, et seq.	Proposed amendments to SS Regulations, including among others Part 1660. (See correction Jan. 25, 1972).	Press Release No. 72-1 dated Jan. 12, 1972.
Jan. 15, 1972	Vol. 37, No. 10; pp. 659, et seq.	Proposed SSS Form 150 Presidential Proclamation 4101—Registration.	Weekly Compilation of Presidential Documents, Jan. 17, 1972.
Jan. 25, 1972	Vol. 37, No. 16; p. 1115	Correction to Proposed SS Regulations published Jan. 12, 1972.	
	p. 1140	Notice of Lottery to be held Feb. 1, 1972.	Press Release No. 72-2, Jan. 21, 1972.
Jan. 29, 1972	Vol. 37, No. 20; pp. 1494, et seq.	Proposed SS Regulations	
Mar. 10, 1972	Vol. 37, No. 48; pp. 5120 thru 5127 pp. 5134, 5135	Effective SS Regulations	
Mar. 14, 1972	Vol. 37, No. 50; pp. 5336 thru 5334	Proposed SS Regulations Chapter 631, RPM (Also rescinds LBM 99).	
Mar. 25, 1972	Vol. 37, No. 59; pp. 6212, 6213	Proposed SS Regulations	
Apr. 1, 1972	Vol. 37, No. 64; pp. 6696 thru 6699 Vol. 37, No. 64; pp. 6719 thru 6720	Proposed SS Regulations Notices—Organization and Sources of Information	
Apr. 8, 1972	Vol. 37, No. 69; p. 7123 pp. 7124-7125 pp. 7125-7129	Notices—National Selective Service Appeal Board. Organization and Activities Sources of Information. Chapters 624, 626, and 627 of RPM.	
Apr. 15, 1972	Vol. 37, No. 74; pp. 7498, 7499	Effective Regulations	
Apr. 18, 1972	Vol. 37, No. 75; pp. 7654-7661	Chapters 613 and 655 of RPM	
Apr. 20, 1972	Vol. 37, No. 77; pp. 7835-7841	RPM—Chapters 604, 611, 612, 617, 621, 623, and 643.	
Apr. 26, 1972	Vol. 37, No. 81; pp. 8412, 8413	Notices—Central and Field Organization; Sources of Information.	
Apr. 27, 1972	Vol. 37, No. 82; p. 8468	Proposed change in SS Regulations—1631.6.	
Apr. 28, 1972	Vol. 37, No. 83; pp. 8584 through 8591.	RPM—Chapter 622	
Apr. 29, 1972	Vol. 37, No. 84; pp. 8665, 8666	Effective SSS Regulations	
Do	pp. 8688, 8689	RPM—Chapter 625 and SSS Form 150.	32 CFR 1600 to End Booklet current as of May 1, 1972.
May 5, 1972	Vol. 37, No. 88; pp. 9114, 9115, 9116, and 9117.	Effective SSS Regulations (Public Information) (Part 1670 revoked).	Letter-size issue of Regulations current as of May 8, 1972.
May 12, 1972	Vol. 37, No. 93; pp. 9566, 9567	Proposed SSS Regulations (Secs. 1626, 1627, 1660, 1661)— See correction May 20, 1972.	
May 19, 1972	Vol. 37, No. 98; pp. 10070, 10071	Effective SSS Regulations Section 1690.14 revoked.	
	Vol. 37, No. 98; p. 10086	Proposed SSS Regulations (Sec. 1632.12).	
May 20, 1972	Vol. 37, No. 99; p. 10405	Correction to Proposed SS Regs.— (a) of Sec. 1661.2, in May 12, 1972 Register.	
May 27, 1972	Vol. 37, No. 104; pp. 10760 through 10768.	RPM—Chapter 628	
June 2, 1972	Vol. 37, No. 107; p. 11058	Effective SSS Regulations (Sec. 1631.6 amended).	

Date	Register No.	Subject	See also
June 7, 1972.....	Vol. 37, No. 110; pp. 11388-11390.	RPM—Temporary Instructions Nos. 632-5, 632-6, and 660-3.	
June 22, 1972.....	Vol. 37, No. 121; p. 12311.....	Effective Regulations Section 1632.12 was added.	Press Release 72-10.
June 23, 1972.....	Vol. 37, No. 122; p. 12391.....	Sections 1626.2 and 1627.7 were amended Effective Regulations.	
June 27, 1972.....	Vol. 37, No. 124; p. 12650.....	RPM—Temporary Instructions—No. 632-7.	
July 14, 1972.....	Vol. 37, No. 136; pp. 13825 through 13838.	RPM Chapters 603, 608, 619, 632, and 642.	
July 19, 1972.....	Vol. 37, No. 139; pp. 14344 and 14345.	RPM—Temporary Instructions—Nos. 660-4, 632-9.	

(24.) RECONCILIATION, NOT RETRIBUTION UNIVERSAL AMNESTY

(By James Reston, Jr.¹)

[February 5, 1972]

Amnesty for Vietnam resisters has suddenly become a live issue. The reasons for that are evident: Nixon says we're in a defensive posture in Vietnam, where our effort can be supported by volunteers; voters are looking to a postwar presidency; the draft calls in the fall and winter have been minimal; and amnesty supporters have been hammering on the point that this is the only logical course to take after an immoral war. There has been national publicity: Mike Wallace badgering families and friends and fellow townspeople of refugees in Canada; *Time* calling for conditional amnesty; *Newsweek* doing a cover story and taking a poll indicating that 63 percent of the American people favor a conditional or general amnesty.

President Nixon, who in November clipped a startling, flat "No" to a question of whether he would consider amnesty, vacillated in his recent TV interview with Dan Rather, saying he intended to be liberal with amnesty once the war is over. Senator Muskie is talking vaguely about a "national objective of repatriating these young people under some conditions which we will have to work out," but bases his timing not even on the end of the war, but on the end of the draft! Even Senator McGovern, who was first of the presidential contenders to advocate amnesty, has failed to say specifically whether he favors a universal or a general amnesty law, and if his idea is for general amnesty, what conditions he favors. And the astonished refugee community in Canada is complaining that it has been made into a political football.

However, no one has done more to advance amnesty than the most unlikely advocate of all, Senator Robert Taft of Ohio. His Amnesty Act of 1972 will be the focus of the upcoming debate in Congress. At first glance, it would seem splendid that a conservative should be taking the lead, and no doubt Taft's move has created an instant constituency for general amnesty. Unfortunately, his bill avoids the central moral question: what is right and appropriate for the sponsor of an immoral war to do with those in flight from it?

What does Taft's bill say?

The price of repatriation for the evader is to be a three-year service (a) in the Armed Forces—that is to say, a denial of the purpose of exile—or (b) in Vista, VA or Public Health Service hospitals, or other unspecified federal service—a slur against Vista, as if the volunteers were the keepers of the poor, like the hospitals are the keepers of the sick. The alternative federal service is to be performed at the minimum pay grade and without eligibility for normal federal employee benefits. For the resister in jail, a plum is offered: he would be credited with up to two years of prison time to apply to his three-year service obligation. And for the deserter, as if conscientious flight once a person sees the horrors of our military and Vietnam policies from the inside is a higher crime, no provision is made. Taft feels normal military justice should take care of the deserters. Congressman Edward Koch of New York who is the longest-standing advocate of "options" for the exiles has offered a bill similar to Sen. Taft's, with the essential difference of a two-year instead of three-year alternative serv-

¹ James Reston, Jr., served in the U.S. Army from 1965 to 1968. His first novel, *To Defend, To Destroy* has recently been published by Norton.

ice. Congressman Koch dispenses with Taft's patronizing rhetoric about the "mis-guided victims of bad advice and poor judgment" but insists on the term "penalties."

The philosophy of retribution that underlies the Taft and Koch bills on two assumptions. First, universal amnesty (no penalty or condition for repatriation) would be unfair or disrespectful to the 55,000 American dead in Vietnam and the three million who served there. Second, universal amnesty would wreck the draft and the government would not be able to raise an army through conscription in future wars.

The first of these is the most galling, for it pits victims against victims. It is the Vietnam policy that has made casualties and mercenaries and POWs and jailbirds and legal evaders and exiles of an entire generation of young Americans. They are *all* casualties. But now, one victim, the Vietnam dead or the Vietnam returnee, is used against another, the refugee. Not that we should be surprised. Young soldiers were used against young protesters around public buildings in the mass protests of the late sixties and at Kent State. The POWs are used to justify a residual force of soldiers, which in turn insures the continuing captivity of the POWs. Is it any wonder that the whole idea of national service out of patriotism has been destroyed for a generation?

No one is asking the mass of Vietnam veterans if they want their sacrifices used in this manner. The point is somehow missed that young veterans groups are the most active antiwar element on campuses today, now that the threat of the draft has diminished. More relevant, it has been barely reported that veterans groups have been in the front of the budding amnesty movement. On Christmas eve, the 103rd anniversary of Andrew Jackson's Universal Amnesty Proclamation of 1868, young veterans from New York, Pennsylvania and North Carolina presented petitions for universal amnesty to the White House with nearly 35,000 signatures. Another veteran-sponsored petition for repatriation is circulating in Florida. These are the only popularly based amnesty petitions in circulation.

What motives the antiwar zeal of these veterans? Their inside knowledge of what our policies have meant to the people of Asia has led to rage over the efforts of the government and the press to sanitize the war news for the American people. They know that while they made a sacrifice of time and even lives, others of their generation made the moral point.

The second argument for repatriation penalties for exiles—that without penalties armies would be difficult to raise in the future—is debatable. It depends on how fresh the memory of Vietnam is. I, for one, hope that the memory of it never fades. For if Lyndon Johnson had thought it doubtful that he could have raised an army for the purposes he used it, his ambitions might have been checked. That he resorted to duplicity as evidenced by the Pentagon Papers, and thereby duped thousands of young Americans to join his army under false pretenses goes to the special bitterness of the veteran today. The memory of Vietnam might say to another generation that it is a duty of citizenship to decide conscientiously *before-hand* if the way it is asked to fight is just and consistent with basic American principles, and if it is not, to refuse to participate. The organization of the late thirties called "Veterans of Future Wars" might well be reactivated.

The Taft and Koch proposals are for domestic consumption, addressed to the Americans who feel some responsibility for the refugees, but who cannot face up to the bigger responsibility, in the Nuremberg sense, of what we have wrought abroad and at home by this war. The congressional proposals offer amnesty without accepting guilt. If none of the refugees returns to face Taft's harsh music, they can say, "We offered it to the bums, but they wouldn't take it. Tough luck."

If the guilt in Vietnam were conditional, then conditional amnesty, like Truman's after World War II, might be appropriate. But the national guilt is total in Vietnam, and if this country wishes to balance that record with positive acts, it must wipe the slate clean.

Universal amnesty is the only alternative consistent with true reconciliation. But it is also the only option that is likely to get the refugees back in force. They have made it very clear that they will accept no imputation of criminal guilt, and they shouldn't.

Herein lies a curious, but persistent misconception both at home and in Canada: That amnesty implies "forgiveness." In fact, it means "forgetfulness" coming from the Greek "amnesia." The distinction is vital to the refugee, for forgetfulness means the possibility of prosecution is forgotten, an exercise in legal book-keeping. This concept is affirmed in the case of *US vs. Burdick* (236 US 79) 1915.

Burdick was the city editor for *The New York Tribune*. He was brought before a grand jury and asked to answer questions regarding investigations of his paper concerning city frauds. He refused to answer on the grounds of incrimination, whereupon President Wilson granted him a pardon from criminal prosecution. Burdick refused the pardon, stating still that answers might incriminate him. He was thereupon charged with contempt. The issue was whether the acceptance of the presidential pardon implied criminal guilt. In overruling the lower court and setting Burdick free, the Supreme Court stated: "If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in the theory of law. It supposed only a possibility of a charge of crime, and interposed protection against the charge, and reaching beyond it, against furnishing what might be urged or used as evidence to support it."

Thus, amnesty means clearing the books of charges made or anticipated for war resistance, placing the burden on the bookkeeper, not on the accused. As I wrote in these pages last October, the books on war resistance, incarnating the elaborate system of spying on antiwar individuals, should be thrown away altogether anyway, because their existence is a violation of freedom of speech and their effect on intellectual inquiry has been devastating. It is no good to wipe the books clean for dissent in one era, only to begin to fill them again with dissenters from the next.

Taft's proposal or any general amnesty variation, of which there are bound to be many in the upcoming debate, does not meet the moral requirement of this country, nor will it induce the refugees to return. The American public has shown its capacity to evade responsibility in the Mylai case. If it insists on the Taft proposal, and if that becomes law, we will follow the course of the Reconstruction amnesties after the Civil War, finding out as Andrew Johnson did that his three general amnesty proclamations were unworkable and inappropriate to the overriding need: to bind the wounds of the country. He found that only universal amnesty would meet that need, but it took him three years.

STATEMENT ON AMNESTY

ADOPTED BY THE ECUMENICAL WITNESS, KANSAS CITY, JANUARY 13-16, 1972

The religious community of the United States, as represented by the Ecumenical Witness, aware that the War in Indochina must be brought to an immediate end, urges the implementation thereupon of a broad, general and plenary amnesty, without any qualifications or conditions, to all those men and women who have been prosecuted or will face possible prosecution by civilian or military courts for any alleged offenses arising out of the War, as well as the meeting of our social responsibility to those who might refuse amnesty, to the civilian members of the resistance, and to those who have served in the military. We urge this amnesty in order to overcome the paralyzing divisiveness of the War as our society and in order to mitigate as far as possible the tragic consequences to the War upon that generation that has been called upon to bear the heaviest existential burden of this war.

We believe that amnesty will be one step toward the reconciliation of the society, but we do not believe that amnesty itself will constitute atonement of the society's responsibility for the War nor will it be in the nature of forgiveness for any offenses, but rather an effort to give ourselves the benefit of moral courage and idealism of the men and women of the young generation. We call upon the religious community further to cooperate with other groups in the society pursuing this objective and to implement this commitment by appropriate educational and other supportive action within their own constituencies.

(25.) STATEMENT OF AMNESTY

There are at least 70,000, and some say as many as 100,000, young American men in Canada, men who have quit the military or refused the draft. Many of them have been joined there by wives and sweethearts, and some have children. There are hundreds of other American men scattered about the world, also in

flight from the military. Some 500 men are held in the federal prisons for resisting the draft, and about 3,000 have already finished their terms, branded for life as felons. At least 5,000 men are now in military stockades, here or abroad, for offenses committed against the military's code, and another 4,500 are confined while awaiting trial. And thousands of men have been, for one reason or another, dishonorably (or less than honorably) discharged during these long, anguished years of the Vietnam War.

These men are all young, many of them still in their teens; most have probably never voted in a federal election. Their lives have been deeply affected by a war which was not of their making, one which—we feel sure—the overwhelming majority of this nation wish we had never begun and pray may quickly end. So deeply felt is the revulsion against this war, that the air is full of charges and countercharges as to who was to blame for it.

While men of our generation dispute blame, the burden of our mistakes will be their life-long inheritance. Are they alone to bear legal responsibility for the war, and all its events?

We say: Let them go and let their records be made clean. Let go those who refused to fight a war that we as a nation have come to detest and to believe wrongly fought. Let go those who ran afoul of military law during a war which many think is itself illegal. Erase the taint on the good name and careers of young men with war-connected prison sentences or less than honorable discharges.

Men who may have violated the laws of other countries may have to answer to those courts. Men who may have violated the civil laws of our country should answer to our courts.

But let there be no legal recriminations among ourselves for the fighting or the refusing to fight this war. The healing and reconciliation of the nation, its redirection toward peace with itself, will be difficult enough. It will be folly to make it even harder by exacting heavy legal penalties from these young men.

We believe and urge that those many thousands gone to Canada and elsewhere should be allowed to return freed of any legal impediments and invited to share here the opportunities and responsibilities of building a better nation.

The alternative would be a class of political exiles, haunting us for decade after decade. If there is statesmanship left among us, we will move now to prevent that grim prospect.

We recognize that what we propose might be a *de facto* repeal of the draft. As to that (and setting to one side for now the morality and constitutionality of a draft for an undeclared war), we say that this matter of amnesty and mutual pardon should be an important element in the discussion of the winding down of the war to be debated and resolved along with other issues. In any event, that which we propose should be done, at the latest, shortly after an armistice in Vietnam, whether that be proclaimed or *de facto*.

Surely a republic which granted amnesty after the Civil War to soldiers who fought in rebellion *against* it will want to do no less for these men whose offense has been only that they refused to fight in an undeclared and unpopular war, thousands of miles from our own shores. With that precedent, and for this far lesser offense, surely we shall want to act more promptly.

The young men of whom we have spoken here are not the only victims of this war, nor have they carried the heaviest burden. The government has been shamefully negligent of the returned veteran. The veterans are entitled (and all our futures require that they should have) every needed assistance in education, employment, health and housing. Men who were maimed and crippled need to have every care and attention science and compassion can provide. And the children of those who died or who have been too badly hurt to look after them fully, should be able to grow with educational and health and housing supports belonging to their fathers.

We address this petition to Congress, in the hope and expectation that it will act; to the President, with similar hope and expectation; to those who aspire to be President, with conviction that here is a good cause for courageous statesmanship; to the public, in the belief that it will want to restore unity among us all; and to the young men whose lives have been dominated by this war, in confidence that they, wherever they are, are already concerned with the making of a better America.

Kenneth B. Clark, Professor of Social Psychology, City University of New York; President, Metropolitan Applied Research Center.

Robert Coles, psychiatrist, Harvard University; author.

Leslie Dunbar, Executive Director, The Field Foundation.

Erik H. Erikson, psychoanalyst and author.

Willard Gaylin, Professor of Psychiatry and Law, Columbia University.

Ernest Gruening, former U.S. Senator from Alaska.

M. Carl Holman.

James M. Lawson, Jr., Executive Board, Committee of Southern Churchmen; Director-designate, Institute for Nonviolent Action, Atlanta.

Benjamin E. Mays, President, Board of Education, Atlanta, Georgia; President Emeritus, Morehouse College.

Charles Morgan, Jr., Southern Regional Director, American Civil Liberties Union.

Charles O. Porter, former U.S. Congressman from Oregon; Chairman, National Committee for Amnesty Now.

Joseph L. Rauh, Jr., attorney; Counsel, Leadership Conference on Civil Rights.

Milton J. E. Senn, Sterling Professor Emeritus of Pediatrics and Psychiatry, Yale University.

Charles E. Silberman, author.

Raymond M. Wheeler, physician; President, Southern Regional Council.

Andrew J. Young, Chairman, Human Relations Commission, City of Atlanta; former Executive Director, Southern Christian Leadership Conference.

(Titles for identification only.) October 15, 1971.

[February 16, 1972]

(26.) THE POWER OF CONGRESS TO ENACT AMNESTY LEGISLATION

(By John D. Sargent, Legislative Attorney, American Law Division,
Library of Congress)

The Constitution does not contain the word "amnesty." The President's power, as provided in the Constitution, is limited to granting "Reprieves and Pardons."¹ The uncertainty which has resulted from the exact meaning of both "pardon" and "amnesty" and the distinction, if any, between them, has confronted courts in the past. The result has been that the distinction between amnesty and pardon is of no practical importance.² "... [E]xcept that the term [amnesty] is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them [amnesty and pardon] is one rather of philological interest than of legal importance."³

More specifically, "Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offence, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons who are subject to trial, but have not yet been convicted."⁴

Further, "Pardon includes Amnesty,"⁵

While the precise question of whether the Congress possesses the power to enact amnesty legislation has never been directly raised before the Supreme Court, there have been cases wherein the Court chose to indicate a possible position by way of comment.

In 1884, the Court was asked to declare unconstitutional a congressional act which authorized the Secretary of the Treasury to "mitigate or remit any fine, penalty, forfeiture, or disability" arising from the violation of revenue laws.⁶

¹ "The President shall . . . have power to grant Reprieves and Pardons for offences against the United States, except in cases of Impeachment." Art. II, § 2.

² *Brown v. Walker*, 161 U.S. 591, 601 (1895).

³ *Knote v. U.S.*, 95 U.S. 149, 153 (1877). But see *Burdick v. U.S.*, 236 U.S. 79, 94-95 (1914), where the Court cites *Knote* with qualifications: "They [amnesty and pardon] are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State." See also, Russ, *Does The President Still Have Amnestying Power*, 16 Mississippi Law Journal 127, 128 (1944).

⁴ *Brown supra*, at 601-02. See also *U.S. v. Hughes*, 175 F. 238, 242 (D.C. Pa. 1892): "Pardons are granted to individual criminals by name; amnesty to classes of offenders or communities. They differ, not in kind, but solely in the number they severally affect."

⁵ *U.S. v. Klein*, 80 U.S. (13 wall) 128, 147 (1871).

⁶ *The Laura*, 114 U.S. 411, 414 (1884).

The appellant argued that ". . . the power of the President to grant pardons includes the power to remit fines, penalties, and forfeitures imposed for the commission of offences against, or for the violation of the laws of, the United States; that such power is in its nature exclusive; and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the Constitutional prerogatives of the President."⁷ (emphasis added).

The Court acknowledged that the President indeed, "under the general, unqualified grant of power to pardon offences, may remit fines, penalties and forfeitures of every description under the laws of Congress."⁸

But the Court continued: "But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States?"⁹

The Court, noting that Congress, from the adoption of the Constitution, had asserted its right to invest the Secretary of the Treasury with such power as was being tested in the case,¹⁰ affirmed the lower court decision. The Court, in so deciding, appears to have affirmed the proposition that the grant of pardoning power to the President by the Constitution, is not so exclusive as to preclude the Congress from authorizing the Secretary of Treasury to remit fines and penalties.

The Supreme Court commented more directly on the matter in an 1896 case, *Brown v. Walker*.¹¹ The facts of *Brown* involved a railway employee, called to testify before a grand jury which was investigating the activities of the Allegheny Valley Railway Company. In response to direct questions, the employee, Brown, refused to answer, on the ground that the answer would tend to incriminate him. He was fined and placed in custody until he was willing to testify. On dismissal of a subsequent writ of *habeas corpus*, Brown appealed to the Supreme Court.

The issue before the Court was whether a Federal statute in effect, granting immunity from prosecution for those willing to testify, was sufficiently protective so as to remove from Brown the protective cloak of the 5th Amendment right to remain silent. Analogizing the protection offered by the Act to that of an "act of general amnesty" the Court thus engaged in a general discussion of Congressional power:

"The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England, (2 Taylor on Evidence, § 1455, where a large number of similar acts are collated), or in this country. Although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this Court in *Ex parte Garland*, 4 Wall. 333, 380, 'it extends to every offense known to law, and may be exercised at any time after its Commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.'" (emphasis added)¹²

The Court ultimately found the Statute sufficiently protective and agreed with the lower court that Brown was deprived of the otherwise operable Fifth Amendment right to silence.

While the facts of *Brown* are readily distinguishable from those which may be expected to attain to the issue of Congressional Amnesty and contemporary dissidents of the Vietnam War, the case has been referred to by several authorities as support for the contention that Congress does have the authority to enact amnesty legislation.¹³

⁷ *The Laura*, *supra*, at 413.

⁸ *The Laura*, *supra*, at 413, 414.

⁹ *The Laura*, *supra*, at 414.

¹⁰ *The Laura*, *supra*, at 414, 415.

¹¹ 161 U.S. 591, 601.

¹² *Brown*, *supra*, at 601. The Court cited *The Laura*, at 601. See also *Burdick v. U.S.*, 236 U.S. 79, 95 where, without citing *Brown*, the Court, *per obiter assertis* "Amnesty is usually general, addressed to classes or even communities, a legislative act. . . ." (Emphasis added.)

¹³ 59 Am. Jur. 2d Pardon and Parole, § 20 (1971): "Although the power to grant reprieves and pardons may be vested in the chief executive, this has never been held to take from the legislature the power to pass acts of general amnesty"; Humpert, *The Pardoning Power of the President*, 30 (1941): "The Pardoning Power is not vested exclusively in the executive. Both the National Congress and the State legislatures grant amnesties." At 43: ". . . the Supreme Court later decided that Congress might grant amnesties prior to conviction, notwithstanding the authority of the President to exercise, free of legislative restraint, his pardoning power in the form of amnesty"; W. W. Willoughby, *The Constitu-*

Only one subsequent¹⁴ federal, majority opinion¹⁵ case, has cited *Brown v. Walker* for the proposition that Congress has the authority to enact amnesty legislation. In 1925, the Circuit Court of Appeals for the Ninth Circuit, in holding that the Prohibition Act of 1925 did not infringe the President's pardoning power, cited *Brown* to the effect that:

"It is also held that Congress may grant amnesty to offenders of a certain class."¹⁶

While occasional, unrelated references to the amnesty discussion in *Brown* occur,¹⁷ the substantive issue of congressional authority in relation to amnesty, has not arisen in any case which has required a definitive determination of the question.

In addition to Court decisions on the question of congressional authority, it should be borne in mind that Congress, itself, has, on several prior occasions, *in fact* enacted amnesty legislation. None of the Acts resulted in litigation on the precise issue of congressional authority. On July 17, 1862, Congress authorized the President to extend pardon and amnesty to persons participating in the rebellion.¹⁸ When President Lincoln granted the amnesty of December 8, 1863, he disclaimed necessity for the authorization.¹⁹ He began his proclamation by saying: "Whereas in and by the Constitution of the United States it is provided that the President shall have power to grant reprieves and pardons . . ." and very plainly showed that he based his authority to grant the proclamation upon the provisions of the Constitution and not upon the act of Congress.²⁰ Congress later repealed its authorization.²¹

In 1872, Congress enacted its first public law granting an amnesty.²² The General Amnesty Law of 1872 removed all political disabilities imposed by the third section of the Fourteenth Amendment from all persons except certain Senators and Representatives and civil and military personnel. A similar but more comprehensive measure was enacted in 1898.²³ While these two acts may stand as examples of the Congress having already engaged in amnesty legislation, it should be noted that the authority for both bills derived from section three of the Fourteenth Amendment itself.²⁴ This fact could negate any reference to the acts as precedent for the proposition that it is within the inherent power of Congress to enact amnesty legislation.

It can be seen that the indirect nature of the Supreme Court's Comments in *Brown* together with a dearth of case of law subsequent thereto, causes at least a question as to the weight which a contemporary court would attach to *Brown*.

tional Law of the United States (2d ed. 1929), III 1429: "Though Congress has thus no power to limit in any way the exercise of the pardoning power by the President, it may itself exercise that power to a certain extent, if exercised prior to conviction. Thus acts of amnesty have been held valid." Note, 34 *Lawyers Reports Annotated* 254 (1905): "While the special Acts of Congress granting pardon or amnesty have not been brought into the Courts for an adjudication of their constitutionality, there is a declaration in favor of the Power of Congress to pass Acts of general amnesty. . . ."

¹⁴ Prior to *Brown*, a district court in Illinois discussed the same statute at issue in *Brown* and flatly declared "It is a statute of pardon." *U.S. v. James*, 60 F. 257, 265 (D.C.N.D. Ill. 1894). The Court so decided without discussing Congressional power to enact such a statute in light of the constitutional grant of pardoning power to the President.

¹⁵ A dissenting opinion of Justices Holmes and Brandeis in *Springer v. Phillipine Islands*, 277 U.S. 189, 211 (1928) cited *Brown* as follows: "It [Congress] has granted an amnesty, notwithstanding the grant to the President of the power to pardon."

¹⁶ *Nix v. James* 7 F. 2d 590, 593 (9th Cir. 1925). See also *U.S. v. Price* 96 F. 960 (D.C. Ky. 1899) where the exact statute involved in *Brown* was at issue and the Court consistently referred to the immunity provision thereof as granting "amnesty," with a citation to *Brown*. Likewise see *U.S. v. Moore* 15 F. 2d 593 (D.C. Ore. 1926) analogizing Congressional grant of immunity to "Amnesty."

¹⁷ *In Re Shead* 302 F. Supp. 560, 563 (D.C.N.D. Calif. 1969); *U.S. v. Reina* 273 F. 2d 234, 235 (2d Cir. 1959); *U.S. v. Swift* 186 F. 1002, 1010 (D.C.N.D. Ill. 1911).

¹⁸ 12 Stat. 592 (1862).

¹⁹ Humpert, *The Pardoning Power of the President* 40 (1941).

²⁰ Note, 34 *Lawyers Reports Annotated* 251, 253 (1905).

²¹ 14 Stat. 377. See 40th Cong., 3d session, S. Rept. No. 239 for the Senate Judiciary Committee's opinion that President was without power to grant amnesty absent Congressional authorization.

²² 17 Stat. 142. (1872).

²³ 30 Stat. 432. (1898).

²⁴ ". . . But Congress may by a vote of two thirds of each house, remove such disability."

(27.) AMNESTY: A BRIEF HISTORICAL OVERVIEW

(By John C. Etridge Foreign Affairs Analyst Foreign Affairs Division Library of Congress)

[February 28, 1972]

INTRODUCTION

In the years ahead the government and people of the United States will continue to face domestic social problems resulting in varying degrees from U.S. involvement in the Indochina war. One such problem that is now beginning to be discussed in the news media and Congress is amnesty for those who have refused to serve in the armed forces or have deserted from them. Seeking a legislative solution, some Members of Congress have expressed interest in the history of amnesties in this country and the extent of Congressional involvement in past amnesties.

Although a number of articles and studies of various aspects of amnesty have been written, a comprehensive treatment of amnesties in American history does not appear to exist.¹ This paper is an effort in that direction, covering the highlights but not exploring the subject in depth. No attempt has been made to delve into the legal intricacies of amnesty; and the constitutional question of Congressional versus Presidential authority to grant amnesty, which arose after the Civil War, is treated only from the historical point of view.

As the reader will discover, amnesty is a rather complicated subject, hazy in concept and, at one point in American history, highly controversial.

Following a brief description of the concept of amnesty, the paper gives some examples of its use in Western societies, including a summary of federal amnesties in this country—with particular reference to those few occasions when Congress took an active role. Finally, the political and social significance of amnesty is touched upon, and there is a brief discussion of the factors contributing to increased public interest in amnesty in this country today.

WHAT IS AMNESTY?

Originating in a Greek term meaning forgetfulness or oblivion, amnesty has become a concept which implies "an act of the legal sovereign conceding, from grace, a voluntary extinction from memory of certain crimes committed against the state."² More simply, amnesty is the official act of overlooking a crime which was committed by a group of people.

The concepts of pardon and amnesty are interrelated. Historically, amnesty evolved from the general pardoning powers of ruling authorities. Pardon does not release the individual from guilt, but from the penalty imposed for a transgression of the law. Similarly, amnesty releases recipients not from guilt but from the penalty imposed by law. "It is a legal oblivion, usually of political offenses. However, only the criminal consequences of the absolved act are destroyed."³

Pardon can be extended to any kind of offender and is usually granted after punishment for the crime has begun. Amnesty has usually been granted to political offenders,³ often before a trial or punishment has begun.

There are two types of amnesties. *General* amnesties cover all classes of offenders. *Particular* amnesties are limited to special groups, sometimes with specific exceptions.⁴

Whether general or particular, an amnesty can be "absolute" (imposing no conditions on the recipients) or "conditional" (demanding performance of certain conditions before entering into effect.) For example, Senator Taft's proposal (S. 3011) to grant amnesty to draft evaders who agree to alternate service, would be a particular, conditional amnesty.

¹ The Civil War period is thoroughly treated in Dorris, Jonathan Truman. *Pardon and Amnesty under Lincoln and Johnson*. Chapel Hill, University of North Carolina Press, 1953. 459 p.

² *Encyclopaedia of the Social Sciences*, vol. 1, New York, Macmillan, 1937, pp. 36-39.

³ *Ibid.*, p. 36.

⁴ Political offense: "A violation of a law or of the public peace for public rather than private reasons, in contradistinction to a crime of moral nature, as murder, arson, or theft, which disturbs the general peace. Political offenders are usually not extraditable." Webster's New International Dictionary of the English Language, 2d ed., Springfield, G&C Merriam Company, 1953, p. 1909.

⁵ *Encyclopaedia of the Social Sciences*, *op. cit.*, pp. 36-39.

However, such formal classifications are not always observed, and descriptive phrases such as "general pardon and amnesty" and "universal amnesty" are used in a variety of ways by writers and statesmen. There is no accepted, standardized usage in American history.

SOME NOTABLE AMNESTIES IN WESTERN HISTORY

The first true amnesty usually cited by students of Western cultures occurred in 404 B.C. when Thrasybulus, an Athenian general, forbade punishment of Athenian citizens for past political acts. After expulsion of the Thirty Tyrants (who were excluded from the amnesty), Thrasybulus granted amnesty to all citizens in an effort to "erase civil strife from memory by the imposition of legal oblivion."¹ Thrasybulus' action, whether or not it was the first, clearly possessed all the characteristics of amnesty as defined today.

Among the many amnesties in French history, the *lettres d'abolition* accompanying a truce between the Armagnacs and the Burgundians in 1413 were an early example. Rioters in Bordeaux were amnestied in 1549. The Edict of Nantes, issued by Henry IV in 1598, ended persecution of the Huguenots (French Protestants).² Napoleon's imperial decree of 1802 and successive amnesties following the civil disturbances of 1871 and the Paris Commune were among the many 19th century French amnesty proclamations.³

Significant among amnesties in England were those granted in 1651 after the Civil War and in 1660 after the restoration of Charles II. Other notable amnesties—all required under peace treaties involving European powers—are outlined below.

The treaty of Osnabruck between the emperor on the one hand and Sweden and the Protestant states of Germany on the other (1648), and that of Oliva between the emperor, Sweden, Poland and the elector of Brandenburg (1660) provided not only that mutual wrongs should be consigned to oblivion but that property should be restored to all persons who had been dispossessed during the war. The final act of the Congress of Vienna in 1815 extended amnesty to Poles and Swedes, and the treaty of Frankfurt between France and Germany in 1871 limited amnesty provisions to the inhabitants of the territory ceded by France to Germany, though this was subsequently extended by special negotiations. The treaty of San Stefano, between Russia and Turkey in 1878, contained the unusual provision requiring Turkey to extend amnesty to its own subjects compromised during the war. The peace of Vereeniging ending the Boer War in 1902 provided amnesty for Boers who accepted British nationality with the exception of a list of Boer officers who were to be tried for violations of the law of war.⁴

Some of the European countries granted amnesties to political prisoners after World War I. On January 13, 1920, the Senate asked the Secretary of State to provide information on the amnesty policies of the wartime allies. Acting Secretary Polk responded by providing the texts of French, Italian, Belgian and Canadian amnesty documents and a statement explaining the British Government's negative position on the question.⁵ Also that year two resolutions were introduced in the Senate advocating amnesty for political prisoners, the most famous of whom was Eugene V. Debs, imprisoned for "pacifism in violation of the 1918 Espionage Act." His sentence was commuted by President Harding in 1921, but his citizenship was never restored.⁶

In December 1920 the Senate held hearings on amnesty for political prisoners, but no report was issued and no further Congressional action ensued.⁷

After World War II, France, Norway, Germany, Belgium, Japan, and the Netherlands granted amnesties or pardons to some who had been engaged in compromising activities.⁸ More recently, after De Gaulle resolved the Algerian conflict, a general amnesty was granted to most of those who had illegally resisted the French government's policies.

¹ *Ibid.*, p. 37.

² *Encyclopaedia Britannica*, v. 1. Chicago, William Benton, 1964: 809.

³ *Encyclopaedia of the Social Sciences*, *op. cit.*, p. 31.

⁴ *Encyclopaedia Britannica*, *op. cit.*, p. 807.

⁵ U.S. Congress. Senate. Amnesty to Prisoners Since the Armistice. Messages from the President . . . Transmitting . . . a Communication from the Acting Secretary of State . . . March 1 and March 11, 1920. 66th Congress, 2d session. Senate Documents no. 241 and 249.

⁶ *Encyclopaedia Britannica* 1. 7, *op. cit.*, p. 137.

⁷ U.S. Congress. Senate. Committee on the Judiciary. Amnesty and Pardon for Political Prisoners. Hearings. Washington, U.S. Govt. Print. Off., 1921. 198 p.

⁸ *Encyclopaedia Britannica*, *op. cit.*, p. 808.

AMNESTIES IN AMERICAN HISTORY

In many countries the power to grant amnesty rests with the legislature rather than the executive. In the United States, however, it has been the President who has exercised such power. Virtually all amnesties have been issued by or in the name of the Chief Executive, although some have been in response to Congressional initiative. Presidential authority to grant pardons and amnesties is derived from the constitutional provision that the "President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."¹

Congress has, however, attempted to assert authority in this regard, especially toward the end of the Civil War and in the years immediately thereafter. The question of Congressional authority to grant amnesty and pardon was considered by the Supreme Court in 1896. Although the case did not involve the issue directly, in *Brown v. Walker* (161 U.S. 591) the Court used language indicating that it could be assumed the President did not have exclusive authority to grant pardon and amnesty. The Court was also of the opinion that the distinction between pardon and amnesty was of no practical importance.

The following is a brief account of Federal amnesties in American history, based upon a review of James D. Richardson's "Compilation of the Messages and Papers of the Presidents" and upon Jonathan Truman Dorris' book, "Pardon and Amnesty under Lincoln and Johnson."²

By pardoning participants in the 1794 Whiskey Insurrection, George Washington set a precedent for a succession of Presidential amnesties. On July 10, 1795, Washington proclaimed "A full, free and entire pardon to all persons . . . of all treasons, . . . and other indictable offenses against the United States committed within the fourth survey of Pennsylvania before the said 22nd day of August last past. . . ."³ Exceptions were made of those who "refused or neglected to give assurance of submission to laws of the United States; violated such assurances after they were given; or willfully obstructed or attempted to obstruct the execution of the acts for raising a revenue on distilled spirits . . . or by aiding or abetting there . . ."⁴

The insurrection had reached a climax on July 17, 1794, when "several hundred men" attacked and burned the home of the regional inspector of the excise.⁵ Washington's pardon came a year later. In his explanation to Congress, the President said: "For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet my personal feeling is to mingle in the operations of the Government every degree of moderation and tenderness which the national justice, dignity and safety may permit."⁶

In 1799 a band of over 100 Pennsylvanians, rebelling against the law for the valuation of lands and dwellings, freed the prisoners of a United States marshal and prevented him from carrying out his duties.⁷ On May 21, 1800, President Adams granted " . . . a full, free, and absolute pardon to all and every person or persons concerned in said insurrection . . . of all treasons, misprisons of treason, felonies, misdemeanors, and other crimes by them respectively done or committed against the United States . . ."⁸

By the Proclamation of October 15, 1807, President Jefferson granted a full pardon to all deserters from the Army of the United States who would surrender themselves within a period of four months.⁹

Prior to and during the War of 1812, proclamations offering "a full pardon" to deserters who surrendered within four months were issued by President Madison on February 7, 1812, October 8, 1812, and June 17, 1814. No exceptions were listed.¹⁰ President Madison also proclaimed an amnesty for the pirates and smugglers in the vicinity of New Orleans who helped fight the British.¹¹

¹ Constitution of the United States, Article II, Section 2.

² Dorris, Jonathan Truman, *Pardon and Amnesty under Lincoln and Johnson*. Chapel Hill, University of North Carolina Press.

³ Richardson, James D., *Compilation of the Messages and Papers of the Presidents*, vol. 10, New York, Bureau of National Literature, Inc., 1897, p. 173.

⁴ *Ibid.*

⁵ *Encyclopaedia Britannica*, *op. cit.*, p. 571.

⁶ Richardson, James D., *op. cit.*, vol. 1, p. 276-277.

⁷ *Ibid.*

⁸ *Ibid.*, pp. 293-294.

⁹ *Ibid.*, p. 413.

¹⁰ Richardson, James D., *op. cit.*, vol. 2, p. 497, 499, 528.

¹¹ *Dictionary of American Biography*, vol. 10, New York, Charles Scribner's Sons, 1966, p. 540.

President Jackson approved a War Department General Order of June 12, 1830, which extended "a free and full pardon" to deserters, subject to the following provisions: those in confinement were to be released and returned to duty; those at large and under sentence of death were to be discharged and never again enlisted in the service of the country.¹

During the confusion at the outbreak of the Civil War many persons were detained by civil and military authorities. But on February 14, 1862, through Secretary of War Stanton, the President directed the release of many political prisoners and others held in military custody "on their subscribing to a parole engaging them to render no aid or comfort to the enemies in hostility to the United States."² On February 24, a special commission was appointed to examine the cases of the state prisoners remaining in military custody and to "determine whether, in view of the public safety and the existing rebellion, they should be discharged or remain . . . for (civil) trial."³

In the Confiscation Law of 1862 Congress authorized President Lincoln to extend pardon and amnesty to persons participating in the rebellion, imposing exceptions or conditions as he deemed expedient.⁴ Subsequent proclamations issued by Lincoln during this critical period acknowledged the statute but indicated that he did not consider it his sole source of authority.⁵

By the Presidential Proclamation of March 10, 1863, deserters who reported on or before April 1, 1863, were restored to their regiments without punishment except for forfeiture of pay and allowances during their absence.⁶

On December 8, 1863, President Lincoln declared in his proclamation:

"Whereas it is now desired by some persons heretofore engaged in said rebellion to resume their allegiance to the United States and to reinaugurate loyal State governments . . . a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves and in property cases where rights of third parties shall have intervened . . ."⁷

Each person was required to subscribe to and "maintain . . . inviolate" a prescribed oath of loyalty to the United States. Officers of the Confederate Government, former officers of the United States who joined the rebellion, and certain other classes of rebels were excepted.⁸

In February 1864, the War Department mitigated the sentences of deserters from death to imprisonment, authorizing generals to restore deserters to duty whenever it was deemed beneficial to the service.⁹

On March 26, 1864, Lincoln found it necessary to issue an additional proclamation defining the cases in which insurgent enemies were entitled to the benefits of the Proclamation of December 8, 1863. He declared that civil and military prisoners were not eligible but added that they might apply to the President for clemency "like all other offenders . . ." The previous proclamation was held applicable only to persons at large who voluntarily took the oath "with the purpose of restoring peace and establishing the national authority."¹⁰

In his Fourth Annual Message in December 1865, Lincoln stated that although many had complied with the measure of the previous year, some had abused the amnesty, necessitating precautionary measures which made the process more complicated. However, special pardons had also been granted to individuals of the excepted classes, and no voluntary application had been denied.¹¹

An Act of Congress approved March 3, 1865, set forfeiture of citizenship as the punishment for desertion and required the President to issue a proclamation pardoning all deserters who returned to their proper posts within sixty days and served a period of time equal to the original term of their enlistment.¹² Lincoln complied by issuing the Proclamation of March 11, 1865. Subsequently, the War

¹ Richardson, James D., op. cit., v. 3, p. 1062-1063.

² *Ibid.*, p. 3304.

³ *Ibid.*, p. 3310.

⁴ Act of July 17, 1862 (12 Stat. 592).

⁵ In his Third Annual Message, December 8, 1863, Lincoln said: "The constitution authorizes the Executive to grant or withhold the pardon at his own absolute discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities." Richardson, James D., op. cit. v. 7, p. 3388.

⁶ *Ibid.*, p. 3364-3365.

⁷ *Ibid.*, p. 3414, 3416.

⁸ *Ibid.*

⁹ *Ibid.*, p. 3434.

¹⁰ *Ibid.*, p. 3419.

¹¹ *Ibid.*, p. 3455.

¹² *Ibid.*, vol. 8, p. 3479-3480.

Department, on July 3, 1866, offered conditional amnesty to all regular army deserters who surrendered before August 15, 1866.⁴

Shortly after taking office, President Andrew Johnson issued a Proclamation of Amnesty and Reconstruction on May 29, 1865, which granted full pardon to all former Confederates (except certain leaders) who took an unqualified oath of allegiance to the United States.⁵

Many Members of Congress disagreed with the President's actions and a struggle ensued between Congress and the Executive over the constitutional question of authority to grant pardon and amnesty. On January 21, 1867, Congress repealed Section 13 (authority of the President to proclaim amnesty and pardon) of the Confiscation Law of 1862, but Johnson treated this repeal as a nullity and extended the provisions for amnesty in three new proclamations in 1867 and 1868. His proclamation of September 7, 1867, offered full pardon to "all persons participating in the late rebellion" who would take an oath of allegiance. Excepted were these classes of Confederates: high-ranking members of the Confederate Government; those who mistreated prisoners of war; and those in civil or military confinement, as well as those engaged directly or indirectly in the assassination of President Lincoln.⁶

A further proclamation issued July 4, 1868, extended full pardon to "all participants engaged in the late rebellion,—those under indictment for treason or felony excepted."⁷ and finally on December 25, 1868, President Johnson granted a full, unconditional pardon and amnesty to "all persons engaged in the late rebellion."⁸

The President's actions caused a furor in Congress. The Senate Judiciary Committee issued a report on February 17, 1869, stating in part:

"The committee, after a careful examination of the subject, have no hesitation in coming to the conclusion that the proclamation in question [of December 25, 1868] was wholly beyond the constitutional power of the President, and that it can have no efficacy to the ends sought to be reached by it."

The Committee offered a resolution "That, in the opinion of the Senate, the proclamation of the President . . . purporting to grant general pardon and amnesty to all persons guilty of treason and acts of hostility to the United States during the late rebellion, with restoration of rights . . . was not authorized by the Constitution or laws."⁹

No action was taken by the Senate on the Committee's proposal, but from this time forward Congress became increasingly involved in the consideration of pardons and the removal of political disabilities. According to Dorris, Congressional clemency was being solicited before the passage of the Reconstruction Acts of 1867 when "persons began appealing to members of Congress for relief from disfranchisement."¹⁰ Prior to that time, as indicated above, Congress had in one instance recommended a Presidential amnesty (1862) and in another authorized and required it (1865). Congress reversed itself in January 1867 by repealing the amnesty provision of the Confiscation Act of 1862.

However, it was the Fourteenth Amendment ratified in July 1868 that served principally to involve Congress in a series of actions on pardons and amnesties. Section three of the Amendment barred from Federal or State office any person "who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution . . . shall have engaged in insurrection or rebellion against the same. . . ." It provided further that this disability could be removed by a two-thirds vote of each House of Congress. As Dorris points out:

"For nearly ten years after the promulgation of the Fourteenth Amendment, Congress gave much time to the removal of disabilities thus imposed. Sometimes these private acts, as in the case of R. R. Butler, applied to only one person; at other times, as in the law of July 25, 1868, they applied to many. In every such measure the names of the beneficiaries were given, even when the lists were long; and as in the case of petitions to the President for pardon in 1865 and 1866,

⁴ 20 Op. Atty. General, p. 345.

⁵ Richardson, James D., *op. cit.*, vol. 8, p. 3508-3510.

⁶ 14 Stat. 377.

⁷ Richardson, James D., *op. cit.*, vol. 8, p. 3745-3747.

⁸ *Ibid.*, pp. 3853-3854.

⁹ *Ibid.*, p. 3906.

¹⁰ S. Rept. 239 (40th Cong., 3rd sess.)

¹¹ Dorris, Jonathan Truman, *op. cit.*, p. 362.

the requests to Congress for removals were numerous. Each appeal was expected to receive special consideration to determine its merits. This required much time that might well have been devoted to other needed legislation, but Congress continued to make removals in special acts until, by March 4, 1871, 4,616 persons had been relieved."¹

With the ratification of the Fourteenth Amendment President Johnson "could, and did, continue to restore civil rights by special pardons and by amnesty, but . . . there was no question as to the power of removing the disability imposed in the third section of the amendment. Congress—not the executive—was to dispose clemency in this particular."²

Whether such action should properly be considered as amnesty is a legal point which this paper will not address. In any case, in addition to the many private acts there were numerous efforts in Congress to enact laws which would provide general relief. After President Grant's annual message of December 1871 recommended such a bill, Congress enacted the general amnesty law of 1872, which "re-enfranchised many thousands," permitting every seat in the House and Senate to be occupied for the first time since 1861.³

In 1876 another bill that would have relieved the several hundred individuals, including Jefferson Davis, who were still barred from holding office failed of passage. However, limited amnesty bills were passed in 1884 and 1896, the former of which lifted restrictions on jury duty and civil office and the latter on appointment to military commissions.⁴ When, under the pressures created by the Spanish-American War, a universal amnesty bill was finally enacted in 1898, its practical effect was virtually nil. "One by one the disenfranchised ex-Confederates had passed away," including Jefferson Davis, who died in 1889 still disqualified from holding office.⁵

Following the Philippine Insurrection, President Theodore Roosevelt on July 4, 1902, proclaimed a "complete pardon and amnesty" for those who had participated.⁶

In December 1916, the Supreme Court ruled that U.S. District Judges had no authority to suspend sentences or the imposition thereof as their judgment might dictate—an authority which had been exercised for many years by some judges and not at all by others. The ruling would have required the enforcement of sentences in thousands of cases. To remedy the situation, President Wilson, by two separate actions in June and August of 1917, amnestied large numbers of persons in certain categories, such as those whose sentences would have already run out if originally imposed and those who had pleaded or been found guilty at least one year prior to June 14, 1917, the date of his first proclamation.⁷

The President's action affecting approximately 5,000 persons,⁸ was not, of course, related to World War I, for which no general amnesty was declared. Subsequently, however, two Presidential proclamations granted particular amnesty to some deserters, in one case, and to draft and espionage law violators in the other. Congress had enacted a law on August 22, 1912, providing that deserters forfeited their citizenship, but it was not until 1924, following the formal declaration ending World War I, that President Coolidge granted amnesty and thus citizenship to approximately 100 persons⁹ who had deserted since the World War I armistice. Much later, in 1933, President Roosevelt granted amnesty and citizenship to violators of draft and espionage acts who had completed their sentences.¹⁰

On December 23, 1947, on the basis of recommendations of an Amnesty Board, President Truman pardoned 1,523 persons of a total of 15,805 cases of those who had evaded or otherwise violated the Selective Service Act during World War II. In a technical sense, President Truman's action constituted a series of individual pardons rather than an amnesty. Executive Order 9814, December 23, 1946, establishing the Amnesty Board did not call for uniform treatment for all offenders. Instead, the order provided the board "examine and consider the

¹ *Ibid.*, p. 368.

² *Ibid.*, p. 369.

³ *Ibid.*, p. 378.

⁴ *Ibid.*, pp. 379-386.

⁵ *Ibid.*, p. 387.

⁶ Richardson, James D., *op. cit.*, vol. 14, pp. 6690-6692.

⁷ *Ibid.*, vol. 16, pp. 8317-8319.

⁸ New York Times, June 16, 1917, p. 18.

⁹ New York Times, March 6, 1924, p. 3.

¹⁰ Proclamation No. 2086, Franklin D. Roosevelt, Public Papers and Addresses, vol. 2, New York, Random House, 1938, pp. 540-541.

cases of all persons convicted of violation of the Selective Training and Service Act of 1940 . . . " In cases when the Board desired to do so, it should "make a report to the Attorney General which shall include its findings and its recommendations as to whether Executive clemency should be granted or denied, and in any case in which it recommends . . . clemency . . . , its recommendations with respect to the form that such clemency should take."¹

In the last days of his administration, on December 24, 1952, President Truman issued two proclamations. The first pardoned exconvicts who had served not less than one year in the armed forces after June 25, 1950 (i.e. after the beginning of the Korean conflict). The second amnestied all persons who, having deserted between July 14, 1945, and June 25, 1950, were consequently court-martialed or dishonorably discharged or both. The effect was to mitigate punishment by restoring voting, office holding and other civil rights.²

There is, however, no record of a Presidential amnesty for draft evasion following the Korean conflict.

CONCLUSION

Every civil struggle in which the victor has not annihilated the vanquished has resulted in an implicit amnesty. "Some peace treaties have not included an amnesty clause, but amnesty is said to be implied except in so far as express provision is made to the contrary."³

But beyond the implied amnesty of the victor, an explicit proclamation by the ruling authority can be viewed as having a discernible social value. An amnesty act is foremost a reaffirmation of the legitimacy of authority.

"Amnesties . . . usually follow civil disturbances which have threatened the government, and . . . the granting of an amnesty is nearly always a sign that the government feels its position secure from violent overthrow, and that having disarmed its enemies in the field, it may proceed with the attempt at disarming hatred and resentment by an act of grace."⁴

By going beyond the strict rule of law to overlook an offense, an act of amnesty reflects flexibility in the hierarchy of values within a society. Although the rule of law is a strong value consideration in our society, an act of amnesty may be undertaken in the spirit that laws are imperfect servants of men. From this viewpoint, amnesty is an expression by the ruling authority of the temporary predominance of one social value (forgiveness, reconciliation) over another social value (rule of law). Amnesty is a recognition that sometimes and in some situations it is healthier for the society to forgive offenses than to risk a continuance of resentment and hatred from within.

Amnesty is thus the available legal instrument in those instances where it is thought that "magnanimity will serve the society's interest better than punishment."⁵ Although it is a temporary waiver of the normal practice of a ruling authority, the act of granting amnesty is at the same time a reaffirmation of legitimacy. Only when the ruling authority is accepted as legitimate can amnesty be beneficial to the society. "Wherever the government feels itself insecure (amnesties) are of doubtful worth. In fact, the standpoint of the group in power, amnesties are politically expedient only when the regime is safe from further violence, and when clemency may not be mistaken for weakness."⁶

If reconciliation efforts tend to surface when a government has endured grave upheaval, it is not surprising that the greatest number of amnesties in American history were granted during and after the Civil War. No other period in our history generated such widespread and controversial interest in amnesty, and at no other time was the country in such great jeopardy.

It is conceivable that the current interest in amnesty is to some extent a measure of the domestic social crisis brought on by the war in Indochina. In the last few months, public interest in various amnesty proposals has become increasingly apparent, and several bills have been introduced in Congress representing diverse approaches to the issue.

Interest in amnesty today has arisen not only because of dissension over the U.S. role in Indochina, but more particularly because a substantial number of

¹ Federal Regulations, Title 3—The President, 1943–1948 Compilation, U.S. Govt. Print. Off., Washington, D.C., 1957, p. 144.

² Federal Register, vol. 17, December 31, 1952, pp. 11833.

³ Encyclopaedia Britannica, op. cit., p. 807.

⁴ Encyclopaedia of the Social Sciences, op. cit., p. 37.

⁵ Neuhaus, John Richard. The Good Sense of Amnesty. Nation, February 9, 1970: 148.

⁶ Encyclopaedia of the Social Sciences, op. cit., p. 38.

men have deserted from or evaded military service. According to the Department of Defense, between July 1966 and July 1971 354,427 servicemen were administratively classified deserters.¹ During this same period 324,168 servicemen in the above category were returned to military control. As of September 1, 1971, 30,259 deserters were still at large.²

The highest incidence of desertion has been in the Army. According to a well-informed commentator, Colonel Robert D. Heintz, Jr., of the North American Newspaper Alliance:

"In 1970, the Army had 65,643 deserters or roughly the equivalent of four infantry divisions. The desertion rate (52.3 soldiers per thousand) is well over twice the peak rate for Korea (22.5 per thousand)."³

Subsequent Department of Defense figures show an even higher desertion rate in the Army for FY 1971: 73.5 per thousand. The highest previous rate in this century was 63 per thousand in 1944.⁴

Although statistics on desertion are reasonably reliable, estimates of the number of draft evaders since 1966 vary enormously. Complete, reliable statistics are not available. Both the Selective Service Headquarters and the Department of Justice point to the complexity and magnitude of the problems inherent in policing the selective service system as an explanation for the lack of official estimates.⁵

There are two general categories of draft evaders: (1) those who fail to register for the draft and (2) registrars who are called but who fail to report at one or another stage of the process of induction.

There appears to be no present basis for estimating the number of evaders in either of these categories. The reason lies in the philosophy which until recently has governed the Selective Service system through its long history—a philosophy emphasizing state and local draft board responsibility for implementation of the system.

Each state has had primary responsibility for meeting draft quotas. Cases of delinquency which occurred in the individual states were handled in the first instance by the local draft boards and the state selective service apparatus. Cases not solved by these methods were then turned over to the appropriate U.S. attorney for investigation and possible prosecution. Only then did these cases come to the attention of officials on the federal level. The number of cases reported by any individual state was largely a function of the degree to which that state systematically tried to keep fully abreast of the situation. Under these circumstances, there has been an understandable lack of uniformity among enforcement standards. In 1971, however, the Selective Service procedures were amended to include the processing of violations reported by State systems through a Regional Counsel of the Selective Service for a legal review for procedural and substantive errors. The use of Regional Counsels has helped create a standard of procedural uniformity throughout the United States.

Current planning at Selective Service Headquarters in Washington calls for a data bank of draft registrants at the national level by July of 1973. This computerized data bank will not contain the backlog from previous years but will be maintained and updated to enable quick read-outs of the status of the draft inventory at any time. Reliable statistical data will then be available on draft registrants who fail to report later. There are, however, no plans for Selective Service to institute a system to correlate the number of persons reaching draft age each year with the actual number of registrants.

Some statistics are available concerning prosecutions by the Justice Department for violation of the draft law. As of June 30, 1971, 5,426 men had been indicted, of whom approximately 3,900 were listed as fugitives. Only 315 men were then in prison or draft evasion.⁶

¹ Persons absent without authority more than 30 days or meeting certain other criteria are administratively classified as deserters.

² Information obtained from the Office of the Director of Legislation and Selected Policies, Assistant Secretary of Manpower and Reserve Affairs, OASD (M&RA) MPP (L&SP) Department of Defense.

³ Heintz, Col. Robert D., Jr. *The Collapse of the Armed Forces*, Armed Forces Journal, June 7, 1971, p. 35.

⁴ OASD (M&RA) MPP (I&SP) Department of Defense, September 24, 1971.

⁵ The discussion of Selective Service procedures in the subsequent paragraphs is based upon information obtained in interviews with Selective Service officials in Washington, D.C.

⁶ Office of the Assistant Attorney General, Internal Security Division, Criminal Section, Selective Service Unit, Department of Justice.

This review of American history indicates several instances of amnesty of one kind or another for deserters, most of which occurred in connection with the Civil War and the War of 1812. Since 1900, amnesties for deserters were granted only by President Coolidge in 1924—applicable to 100 or so men who had deserted subsequent to the armistice ending World War I—and by President Truman in 1952—pertaining to persons convicted for having deserted during the period between the end of World War II and the beginning of the Korean conflict.

Amnesties for those violating the draft laws have been few indeed. The historical record shows only two such instances, the first in 1933 and the second in 1947. President Roosevelt's amnesty, applying to some 1,500 persons convicted of having violated espionage or draft laws in World War I, did not occur until fifteen years after the war had ended. President Truman's 1947 proclamation, as already indicated, was not truly an amnesty. Of more than 15,000 men who had evaded the draft in World War II, only 1,523 were pardoned by this action, which occurred two years and four months after the Japanese surrender.

Thus, it is apparent that during this century pardon and amnesty have not come quickly for persons guilty of desertion or draft evasion during periods of military hostilities, and those receiving amnesty have been select groups representing only a small proportion of the total number of offenders. At no time, however, did the number of offenders approach the total number thought to be involved today. An amnesty on this scale would be unique in 20th century American history. On the other hand, the circumstances which have given rise to the present amnesty question are unprecedented. Traditionally, deserters and draft evaders have enjoyed little or no popular support. They have been looked upon as cowards and shirkers refusing a basic duty to their country. The social and political circumstances surrounding the Indochina war, however, have to some extent altered this traditional image. Draft evasion has come to be regarded by some as a response to higher moral standards rather than a manifestation of cowardice or the evasion of responsibility. At least this is true for many draft evaders, and their philosophy has apparently achieved a substantial degree of social acceptability. Indeed, some might argue that inasmuch as the whole question of the war and the draft has come to be considered in moralistic rather than legalistic terms the same approach should apply to the question of amnesty for those who chose the path of draft evasion as an expression of their personal convictions toward the war.

In the final analysis, however, if amnesty is granted in the current situation, it will have to represent a balancing of both legal and social considerations. In all probability it will be fashioned in a manner to take account of those who served as well as those who refused to do so. One of the most important factors, of course, is timing, and President Nixon has made his position clear on this. In his television interview on January 2, 1972, he said: "Amnesty, of course, is always the prerogative of the Chief Executive. I, for one, would be very liberal with regard to amnesty, but not while there are Americans in Vietnam fighting to serve their country . . . and not when POW's are held by North Vietnam."

LIST OF AMNESTIES IN AMERICAN HISTORY, 1795 TO DATE¹

Date	Issued by	Persons affected and nature of action
July 10, 1795.....	Washington.....	Whisky insurrectionists (several hundred). General pardon to all who agreed to thereafter obey the law.
May 21, 1800.....	Adams.....	Pennsylvania insurrectionists. Prosecution of participants ended. Pardon not extended to those indicted or convicted.
Oct. 15, 1807.....	Jefferson.....	Deserters given full pardon if they surrendered within 4 months.
Feb. 7, 1812, Oct. 8, 1812, June 14, 1814.....	Madison.....	Deserters—3 proclamations. Given full pardon if they surrendered within 4 months.
Feb. 6, 1815.....	do.....	Pirates who fought in War of 1812 pardoned of all previous acts of piracy for which any suits, indictments or prosecutions were initiated.
June 12, 1830.....	Jackson (War Department).....	Deserters, with provisions: (1) Those in confinement returned to duty; (2) those at large under sentence of death discharged, never again to be enlisted.
Feb. 14, 1862.....	Lincoln (War Department).....	Political prisoners paroled.

See footnote at end of table, p. 669.

LIST OF AMNESTIES IN AMERICAN HISTORY, 1795 TO DATE¹—Continued

Date	Issued by	Persons affected and nature of action
July 17, 1862 (Confiscation Act)	Congress	President authorized to extend pardon and amnesty to rebels.
Mar. 10, 1863	Lincoln	Deserters restored to regiments without punishment, except forfeiture of pay during absence.
Dec. 8, 1863	do	Full pardon to all implicated in or participating in the "existing rebellion" with exceptions and subject to oath.
Feb. 26, 1864	Lincoln (War Department)	Deserters' sentences mitigated, some restored to duty.
Mar. 26, 1864	Lincoln	Certain rebels (clarification of Dec. 8, 1863, proclamation).
Mar. 3, 1865	Congress	Desertion punished by forfeiture of citizenship; President to pardon all who return within 60 days.
Mar. 11, 1865	Lincoln	Deserters who returned to post in 60 days, as required by Congress.
May 29, 1865	Johnson	Certain rebels of Confederate States (qualified).
July 3, 1866	Johnson (War Department)	Deserters returned to duty without punishment except forfeiture of pay.
Jan. 21, 1867	Congress	Sec. 13 of Confiscation Act (authority of President to grant pardon and amnesty) repealed.
Sept. 7, 1867	Johnson	Rebels—additional amnesty including all but certain officers of the Confederacy on condition of an oath.
July 4, 1868	do	Full pardon to all participants in "the late rebellion" except those indicted for treason or felony.
Dec. 25, 1868	do	All rebels of Confederate States (universal and unconditional).
May 23, 1872	Congress	General amnesty law reenfranchised many thousands of former rebels.
May 24, 1884	Congress	Lifted restrictions on former rebels to allow jury duty and civil office.
Jan. 4, 1893	Harrison	Mormons—liability for polygamy amnestied.
Sept. 25, 1894	Cleveland	Mormons—in accord with above.
March 1896	Congress	Lifted restrictions on former rebels to allow appointment to military commissions.
June 8, 1898	Congress	Universal Amnesty Act removed all disabilities against all former rebels.
July 4, 1902	T. Roosevelt	Philippine insurrectionists. Full pardon and amnesty to all who took an oath recognizing "the supreme authority of the United States of America in the Philippine Islands."
June 14, 1917	Wilson	5,000 persons under suspended sentence because of change in law (not war related).
Aug. 21, 1917	do	Clarification of June 14, 1917, proclamation.
Mar. 5, 1924	Coolidge	More than 100 deserters—as to loss of citizenship for those deserting since World War I armistice.
Dec. 23, 1933	F. Roosevelt	1,500 convicted of having violated espionage or draft laws (World War I) who had completed their sentences.
Dec. 24, 1945	Truman	Several thousand ex-convicts who had served in World War II for at least 1 year. (Proclamation 2675, Federal Register p. 154).
Dec. 23, 1947	do	1,523 individual pardons for draft evasion in World War II, based on recommendations of President's Amnesty Board.
Dec. 24, 1952	do	Ex-convicts who served in Armed Forces not less than 1 year after June 25, 1950.
Do	do	All persons convicted for having deserted between Aug. 15, 1945, and June 25, 1950.

¹ In this table amnesty is broadly defined to permit inclusion of several actions by the Executive that should properly be considered "pardons" as well as legislative actions by Congress.

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¹ Nancy Davenport, Foreign Affairs Bibliographer, assisted in the preparation of this bibliography.

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